No. 73-1346

# In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN L. McLUCAS, SECRETARY OF THE AIR FORCE, ET AL., APPELLANTS

*v.*

RAYMOND G. DECHAMPLAIN

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

## JURISDICTIONAL STATEMENT


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## JURISDICTIONAL STATEMENT

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### OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 15–28) is not reported.

### JURISDICTION

The preliminary injunction of the district court (App. B, *infra*, pp. 29–30), was entered November 13, 1973. A notice of appeal to this Court (App. C, *infra*, p. 31), was filed on December 12, 1973. On February 12, 1974, the Chief Justice extended the time for docketing the appeal to March 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1252 since a court

of the United States has entered an interlocutory order holding unconstitutional an act of Congress, Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934, in a civil action to which an officer of the United States is a party.

## STATUTE INVOLVED

Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934, provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

## QUESTIONS PRESENTED

1. Whether the district court properly enjoined a pending military court-martial.

2. Whether the third clause of Article 134 of the U.C.M.J., 10 U.S.C. 934, which confers court-martial jurisdiction over "crimes and offenses not capital," is unconstitutionally vague.

3. Whether the district court properly invalidated restrictions on access to classified documents and their use placed upon the defendant's civilian counsel.

## STATEMENT

Appellee Air Force Master Sergeant DeChamplain was charged before a court-martial in 1971 with copying and attempting to deliver classified military information to a Russian government agent while stationed in Bangkok, Thailand, in June and July, 1971 (App. A, p. 15). The classification of the information varied from "confidential" to "top secret."[1]



In November 1971, DeChamplain was tried by general court-martial and convicted of three offenses: (1) violating Article 81 of the Uniform Code of Military Justice by conspiring to communicate classified information to an agent of a foreign government in violation of Article 134 and 50 U.S.C. 783(b); (2) violating Article 92 of the Code by failing to obey an Air Force regulation requiring contacts with foreign agents to be reported; and (3) violating Article 134 of the Code by copying classified documents in violation of 18 U.S.C. 793(b), and by attempting to deliver such copies to an unauthorized person in violation of 18 U.S.C. 793(d). DeChamplain was sentenced to 15 years' confinement, reduction to the lowest rank, total forfeiture of pay, and a dishonorable discharge.

The Air Force Court of Military Review reversed this conviction and remanded the case in 1972, on the ground that DeChamplain's confession, which had been admitted into evidence, had been involuntary. *United States* v. *DeChamplain*, ACM 21034, 46 C.M.R. 784, affirmed, 22 U.S.C.M.A. 150, 46 C.M.R. 150.

The Air Force then prepared to retry DeChamplain before a second general court-martial upon substantially the same charges. DeChamplain filed with the military judge a number of motions to dismiss the

[1] *United States* v. *DeChamplain*, ACM 21034, 46 C.M.R. 784, affirmed, 22 U.S.C.M.A. 150, 46 C.M.R. 150.

charges against him on various grounds, including the alleged unconstitutionality of Article 134 and a claimed denial of access to classified documents relevant to his prosecution. These motions were denied. DeChamplain also filed three successive petitions for extraordinary relief in the Court of Military Appeals, all of which were also denied. *DeChamplain* v. *United States*, 22 U.S.C.M.A. 211, 46 C.M.R. 211, and No. 73–26, 46 C.M.R. 1329; *DeChamplain* v. *McLucas*, 22 U.S.C.M.A. 462; 47 C.M.R. 552. DeChamplain's second court-martial was scheduled to begin on November 15, 1973, at Richards-Gebaur Air Force Base, Missouri (App. A, p. 15 ).[2]

On October 3, 1973, DeChamplain brought suit in the District Court for the District of Columbia to enjoin the court-martial. The district court granted a preliminary injunction. The court first held that it could review the merits of DeChamplain's claims while his court-martial is pending (App. A, pp. 19–20). Next, the court held that DeChamplain could not be tried on the two charges under Article 134 because that Article is unconstitutionally vague (App. A, p. 20).

Finally, the court ruled that the restrictions imposed upon the use of classified documents by DeChamplain's civilian defense counsel preclude a fair trial. The Air Force had authorized DeChamplain, his military and civilian counsel, as well as a civilian associate and secretary, to have access to all pertinent

[2] Since his arrest in July 1971 and throughout these proceedings, DeChamplain has been in military confinement (App. A, p. 23).



evidence to be used against DeChamplain including the classified material which DeChamplain is charged with having attempted to deliver to Soviet agents. With respect to fifteen of the classified documents that DeChamplain allegedly attempted to deliver, however, the Air Force decided to drop the charges against DeChamplain rather than to disclose the documents (App. A, p. 25). As these fifteen documents were introduced as evidence at the first court-martial, DeChamplain and his military counsel have had access to them, but they are barred from discussing them with civilian counsel (App. A, p. 22). In addition, with respect to the nine other classified documents which the Air Force intends to use in the second court-martial, it imposed the following restrictions:

> (A) The documents may not be released to civilian counsel; (B) They may see and read the documents only in the presence of one holding the appropriate security clearance; (C) They may not make copies of the documents; (D) No written notes made by them with respect to classified information contained in said documents may be removed from Air Force control; and (E) They will be advised of applicable laws and penalties for unauthorized release of classified information.

The district court invalidated the restrictions and enjoined prosecution of DeChamplain unless "full and unlimited access to all documents relevant and material to" the case is granted to DeChamplain, his civilian counsel, "and such legal associates and assistants, subject to an appropriate protective order, as are

necessary to said counsel's adequate preparation for trial." (App. B, p. 30) Specifically, the court directed that the entire record of the first court-martial be delivered to civilian counsel.[3]

### THE QUESTIONS ARE SUBSTANTIAL

1. The present case is one of several recent cases in which district courts have enjoined pending court-martials,[4] and this case is an appropriate vehicle for this Court to review the important question of the authority of the federal courts to do so.

a. The action of the district court is contrary to the well-established doctrine prohibiting federal courts from enjoining prosecutions pending in other jurisdictions except in limited and unusual circumstances. *Younger* v. *Harris,* 401 U.S. 37; *Dombrowski* v. *Pfister,* 380 U.S. 479. Although *Younger* and *Dombrowski* involved injunctions of state prosecutions, the reason-

[3] The district court did not reach two other claims raised in the complaint. One of these challenged the Air Force's refusal to authorize DeChamplain's military counsel to represent DeChamplain in ancillary federal civilian proceedings against the Air Force. (App. A, p. 17). The other challenged possible exclusion of members of the public during the portions of DeChamplain's court-martial in which classified materials are discussed (App. A, pp. 22–23).

[4] *McCahill* v. *Eason,* 361 F. Supp. 588 (N.D. Fla.); *Moylan* v. *Laird,* 305 F. Supp. 551 (D. R.I.); *Schroth* v. *Warner,* 353 F. Supp. 1032 (D. Hawaii); *Redmond* v. *Warner,* 355 F. Supp. 812 (D. Hawaii); *Holder* v. *Richardson,* 364 F. Supp. 1207 (D. D.C.), appeal pending, No. 73–2034 (C.A.D.C.); *Cf., Hemphill* v. *Moseley,* 443 F. 2d 322 (C.A. 10); *Councilman* v. *Laird,* 481 F. 2d 613 (C.A. 10), certiorari granted, No. 73–662; *Contra, Sedivy* v. *Richardson,* 485 F. 2d 1115 (C.A. 3), petition for certiorari pending, No. 73–6030; *Dooley* v. *Ploger,* No. 73–1900 (C.A. 4, Feb. 12, 1974).



ing of those decisions has been correctly applied to court-martial proceedings. See, *e.g., Sedivy* v. *Richardson,* 485 F. 2d 1115 (C.A. 3), petition for a writ of certiorari pending, No. 73–6030; *Levy* v. *Corcoran,* 389 F. 2d 929 (C.A.D.C.), certiorari denied, 389 U.S. 960.

This Court's opinion in *Younger* makes clear that the irreparable harm which alone justifies federal court injunction of pending proceedings must be something more than "that incidental to every criminal proceeding brought lawfully and in good faith." 401 U.S. at 49. In the present case there is no suggestion that ~~petitioner's~~ DeChamplain's court-martial is being brought in bad faith or for the purposes of harassment, and the fact that ~~petitioner~~ he alleges Article 134 to be unconstitutionally vague is not sufficient to justify injunctive relief. *Younger* v. *Harris, supra* at 49.

The district court's basis for finding irreparable harm in the present case was that "in the event plaintiff is convicted and is sentenced to a period of confinement, plaintiff will have served all or a good portion of any sentence in imprisonment prior to exhaustion of his appellate remedies in the military courts" (Pet. App. A, pp. 27–28). This basis is legally insufficient as demonstrated by *Younger, supra.* The order below does not, in any event, terminate DeChamplain's present confinement. Article 10 of the Uniform Code of Military Justice, 10 U.S.C. 810, provides for confinement pending courts-martial, and the district court order does not affect his confinement.

Moreover, the prospect of confinement during exhaustion of remedies cannot serve as a basis for find-

ing irreparable harm; otherwise, the rule against injunctions of pending prosecutions would be destroyed since probably most criminal defendants face the prospect of confinement if convicted.

b. The injunction granted by the district court was improper for the further reason that it constitutes an impermissible interference by a civilian court with the military court-martial system. As Judge Leventhal wrote in his concurring opinion in *Levy* v. *Corcoran, supra* at 930:

> The lack of equity jurisdiction to issue an injunction * * * inhere[s] in the relationship of the civil courts and military tribunals, a relationship which looks to habeas corpus or kindred remedies as the technique by which the civil courts exercise such limited intervention as may be proper in cases taken before military tribunals.

Pursuant to its power "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, sec. 8, cl. 14, Congress has established special courts for military criminal cases. *Burns* v. *Wilson,* 346 U.S. 137. Civilian courts have no "appellate jurisdiction to supervise the administration of criminal justice in the military," *Noyd* v. *Bond,* 395 U.S. 683, 694. As Judge Leventhal pointed out in *Levy* v. *Corcoran, supra,* civilian court review of military proceedings has been limited to *habeas corpus* or kindred review, and then only after "* * * all available remedies within the military court system have been invoked in vain." *Noyd* v. *Bond,* 395 U.S. 683, 696 n.8; *Gusik* v. *Schilder,* 340 U.S. 128.



The district court sought to justify its interruption of the impending court-martial on the ground that DeChamplain's challenge to the constitutionality of Article 134 presented a purely legal question outside the expertise of military courts. As noted earlier, the asserted unconstitutionality of a statute is not a sufficient ground for injunctive relief. As stated in *Levy* v. *Corcoran, supra* at 930–931, "* * * petitioner can preserve his constitutional defenses before the general court-martial and in due course can present them to the Court of Military Appeals."

The principles underlying the prohibition on injunctions of pending court-martial proceedings are based on both a proper regard for the integrity of the military court system and the conservation of scarce federal judicial resources. Civilian court intervention prior to military trial and appeal inevitably results in disruption of the court-martial process. Delay occasioned by such piece-meal review makes trial by court-martial more difficult and perhaps impossible. Moreover, such intervention might become unnecessary if the court-martial proceeding were permitted to follow its normal course. Indeed, an acquittal at trial or a reversal at the appellate stage (as occurred in DeChamplain's first court-martial) would obviate the need for any civilian court review.

2. The injunction below was also improper because it rests upon two substantive determinations which are erroneous under the pertinent decisions of this Court.

The district court enjoined DeChamplain's prosecution under Article 134 based upon the lower court rulings in *Secretary of the Navy* v. *Avrech,* No. 72–1713, and *Parker* v. *Levy,* No. 73–206. Aside from the fact that the alleged unconstitutionality of Article 134 does not provide a basis for injunctive relief (see p. 9, *supra*), the Court's holding that the third clause of article 134 prohibiting "crimes and offenses not capital" is unconstitutionally vague is erroneous.

The third clause of Article 134 is in effect an assimilative crimes provision—that is, it confers court-martial jurisdiction over service-connected noncapital federal offenses not otherwise punishable under the Uniform Code of Military Justice. *United States* v. *Frantz,* 2 U.S.C.M.A. 161, 7 C.M.R. 37. See Manual for Courts-Martial ¶ 213e. DeChamplain's challenge to the third clause of Article 134 is similar to the challenge to the Assimilative Crimes Act, 18 U.S.C. 13, rejected in *United States* v. *Sharpnack,* 355 U.S. 286. In sustaining that statute, this Court held: "Whether Congress sets forth the assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as the state laws themselves." *United States* v. *Sharpnack, supra,* at 293. DeChamplain does not contend that the incorporated statutes that he is accused of violating—18 U.S.C. 793 (b) and (d) and 50 U.S.C. 783(b)—are unduly vague.

Moreover, neither the third clause of Article 134 nor the provisions of the incorporated statutes are unconstitutionally vague as applied to DeChamplain. In *Broadrick* v. *Oklahoma,* 413 U.S. 601, this Court



held that "even if the outermost boundaries" of a statute "may be imprecise, any such uncertainty has little relevance" where the accused's conduct "falls squarely within the 'hard core' of the statute's proscriptions * * *." 413 U.S. at 608. DeChamplain cannot contend that the statutes he is charged with violating do not prohibit attempting to deliver top secret defense documents to the Soviets.

The third clause of Article 134 is simply not vulnerable to a claim based on vagueness. Thus, the district court's holding is erroneous and is unrelated to the issues presented by *Avrech* and *Levy* which involve the constitutionality of other portions of Article 134.

3. Finally, the district court also erred in holding that the restrictions regarding access to and use of the classified materials in issue preclude a fair trial. No evidence is being withheld from DeChamplain or his civilian and military counsel. The restrictions regarding use of the classified materials are a reasonable accommodation of the accused's interests, on the one hand, and the military's legitimate interest in preventing widespread dissemination of the materials, on the other hand. In addition, after the district court's opinion was rendered, the Air Force amended its restrictions to enable two foreign-policy experts selected by DeChamplain to have access to the classified materials. (Pet. App. D, *infra,* pp. 32–33). This amendment removes the basis of DeChamplain's principal challenge to the original restrictions (Pet. App. A, p. 17).

In *United States* v. *Augenblick,* 393 U.S. 348, this Court rejected the claim of a serviceman that his

court-martial conviction was constitutionally defective because he had been denied access to potential evidence in the prosecutor's possession. *Augenblick* held that "apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten * * * that the proceedings is more a spectacle * * * or trial by ordeal * * * than a disciplined contest." 393 U.S. at 356. There is no basis for concluding that the restrictions imposed upon DeChamplain's use of the classified material would have that effect.

Moreover, DeChamplain unsuccessfully challenged the restrictions regarding use of classified materials in his petition for extraordinary relief in the Court of Military Appeals. *DeChamplain v. McLucas,* 22 U.S.C.M.A. 462, 47 C.M.R. 552. Congress has provided that the decisions of military courts shall be "final and



conclusive" and "binding upon all * * * courts * * * of the United States * * *." 10 U.S.C. 876. The decision below, therefore, is essentially an unauthorized appeal from a pre-trial discovery determination of the military courts.

## CONCLUSION

For the foregoing reason, probable jurisdiction should be noted.

Respectfully submitted.

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MARCH 1974.

# APPENDIX A

United States District Court for the District of Columbia

(Filed November 13, 1973—James F. Davey, Clerk)

RAYMOND G. DECHAMPLAIN, PLAINTIFF

*v.*

JOHN L. MCLUCAS, SECRETARY OF THE AIR FORCE, ET AL., DEFENDANTS

Civil Action No. 1863–73

## *MEMORANDUM: FINDINGS OF FACT AND CONCLUSIONS OF LAW*

The plaintiff, a non commissioned officer in the United States Air Force seeks injunctive relief against the Secretary of the Air Force, the Chief of Staff, Department of the Air Force, the Judge Advocate General of the Air Force and certain officers of the Richards-Gebaur Air Force Base, Missouri. His complaint alleges that he is scheduled for trial on November 15, 1973 by a general court martial convened by the Commanding Officer, 1840th Air Base Wing, on various charges and specifications in violation of the Uniform Code of Military Justice (UCMJ), specifically, Article 81—conspiracy, Article 92—failure to obey a lawful general regulation, Article 134—the so called "general article," 10 U.S.C. §§ 881, 892 and 834. Those charges relate to alleged espionage activities by the plaintiff in the summer of 1971 while stationed in Thailand. A prior conviction



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and sentence on the charges were set asde and rehearing authorized by the Air Force Court of Military Review, *United States* v. *DeChamplain,* ACM 210434, 46 CMR (Oct. 5, 1972). That tribunal found that plaintiff's involuntary confession was wrongfully introduced at the trial. The decision of the Court of Military Review was affirmed on appeal, *United States* v. *DeChamplain,* 22 U.S. CMA 150, 44 CMR 150 (Feb. 16, 1973).

During the subsequent pretrial proceedings conducted pursuant to Article 39(a) UCMJ, 10 U.S.C. § 839(a), the presiding military judge rejected various objections made by defense counsel which are central to this litigation:

1. That the Article 134 specifications be dismissed based upon the recent decisions invalidating that provision as unconstitutional. *Avrech* v. *Secretary of the Navy,* 477 F. 2d 1237 (D.C. Cir. 1973); *Levy* v. *Parker,* 478 F. 2d 772 (3rd Cir. 1973); *Hooper* v. *Laird,* 482 F. 2d 784 (D.C. Cir. 1973).

2. That retained civilian defense counsel, Leonard B. Boudin, Esquire, be permitted complete access to certain classified documents for the purposes of copying and discussion with partners, associates as well as outside consulting experts. These documents which comprise the heart of the court martial charges, were allegedly transmitted by DeChamplain to foreign agents.[1] Substantial restrictions have been imposed upon Mr. Boudin's use of these documents. Copies would not be provided; examination could only take

[1] Charges relating to certain classified documents, to which the military had sought absolute non-disclosure, have been dropped. The military had evidently chosen not to prosecute those charges rather risk being forced to disclose the documents on even a limited basis. The issue of access to documents, therefore, relates only to those upon which the Air Force is basing their case.



place in the presence of military authorities; no notes could be taken from the "secured" area; all notes taken would be reviewed by military officials to determine whether or not they must remain in the "secured" area; the classified information could not be viewed by or discussed with anyone except for one associate attorney and one secretary.[2]

3. That the Court martial proceeding be open fully to the public and the press during all phases, including the time when the classified documents are discussed.[3]

The plaintiff then raised these issues in a petition for Extraordinary Relief before the United States Court of Military Appeals. The petition was summarily denied, United States Court of Military Appeals, Misc. Docket 73-46, September 5, 1973. Complaining that these rulings by the military constitute serious deprivations of his constitutional rights to due process and fair trial, plaintiff now requests this Court to intervene in the military judicial process by enjoining the forthcoming court martial unless and until the alleged deficiencies are rectified.

On November 9, 1973 the matter came before the Court on plaintiff's motion for a preliminary injunc-

[2] Civilian counsel, who is experienced in "espionage" trials, has expressed his desire to consult with and seek the advice of several experts in national security matters. The nature and contents of classified documents are crucial to establishing and defending such charges. See e.g. *Gorin* v. *United States,* 312 U.S. 19 (1941); *United States* v. *Heine,* 151 F. 2d 813 (2d Cir. 1945).

[3] A fourth issue, not raised at the Article 39(a) pretrial hearings, has been introduced into this suit: that DeChamplain's military appointed judge advocate has been improperly refused permission to represent the sergeant in ancillary federal court proceedings. The Court, in reaching its decision, need not and will not rule upon this point, which counsel candidly admitted during oral argument as being tangential to the gravamen of the complaint.

tion and the government's motion to dismiss. As to both motions, the government adopted a central position: that the posture in which the case is presented compels the Court to abstain from interfering with the court martial proceedings since the plaintiff has not exhausted the military remedies available to him through appellate review.

After full briefing and argument the Court concludes that the circumstances here presented are sufficiently compelling to warrant intervention and, in accordance with the Findings of Fact and Conclusions of Law set forth below, hereby preliminarily enjoins prosecution of the pending court martial of the plaintiff.

It is well established, and plaintiff must concede, that generally a serviceman must first exhaust his military remedies before a federal court will interfere with court martial proceedings. *Noyd* v. *Bond*, 395 U.S. 683 (1969); *Sedivy* v. *Richardson*, 3rd Cir. No. 72-2065, decided September 26, 1973; *Levy* v. *Corcoran*, 389 F. 2d 929 (D.C. Cir. 1967). Accordingly, the government contends that plaintiff must first stand trial, which might result in acquittal, and then, if convicted, utilize the military appellate procedure before applying to this Court for relief. This rule is by no means inflexible and exceptions have been acknowledged. In *Noyd* upon which the government heavily relies, Mr. Justice Harlan noted that there may well exist situations which justify a claimant to seek vindication of his rights through the civilian courts without first utilizing the military appellate machinery, particularly when "the complainants raised substantial arguments denying the right of the military to try them at all." 395 U.S. 683, 696 n. 8. See also *Hemphill* v. *Moseley*, 443 F. 2d 322, 323 (10th



Cir. 1971). Although *Noyd* held that the doctrine of exhaustion would control, that decision was at least partially based upon the reluctance to pass upon questions of military law for which the Court felt no expertise.[4]

This concern was also evidenced in the most recent case, *Sedivy* v. *Richardson, supra*. There, Sedivy had prevailed upon the district court to enjoin his pending court martial, claiming that the charges against him were not service-related and therefore the military lacked jurisdiction to try him. *O'Callahan* v. *Parker*, 395 U.S. 258 (1969). In setting aside the order on grounds of failure to exhaust remedies the Third Circuit observed that the claims raised necessarily involved factual determinations and factors which could have and should have been acted upon in the first instance by the military.[5] However, the court significantly acknowledged that under compelling circumstances the exhaustion requirement could be dispensed with:

> "We perceive the presence of no countervailing circumstances to necessitate a departure from the normal requirement of exhaustion of military remedies before recourse to federal civilian courts." Slip Opinion at 9.

The circumstances surrounding this case are such that unless this Court takes affirmative action Ser-

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[4] "Moreover, if we were to reach the merits of petitioner's claim for relief pending his military appeal we would be obliged to interpret extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence and which have not been fully explored by the Court of Military Appeals itself. There seems little reason to blaze a trial on unfamiliar ground when the highest military court stands ready to consider petitioner's argument." 395 U.S. at 696.

[5] *Sedivy* v. *Richardson*, supra, Slip Opinion at 11.

geant DeChamplain will be denied fundamental constitutional guarantees.

The matters raised in this litigation do not neccesitate determinations which the military forum is best equipped to make. The issues are purely legal: whether the military has jurisdiction to try plaintiff for violations of a statute which stands unconstitutional under circumstances and conditions which may unduly impede his preparation and presentation of a sound defense. No compelling justifications have been presented which require this Court to defer consideration of these matters to the military.

### Article 134

The status of Article 134 is not uncertain at this time—it is unconstitutional.[6] *Avrech* v. *Secretary of the Navy, supra; Levy* v. *Parker, supra; Hooper* v. *Laird, supra; Stolte* v. *Laird,* 353 F. Supp. 1392 (D.D.C. 1972). The military, however, has refused to accept this ruling, and, as evidenced by this suit, persists in prosecuting under the outlawed provision. See *United States* v. *Unrue,* No. 26,552 United States Court of Military Appeals, April 2, 1973, in which the nation's highest military tribunal, relying upon an 1858 Supreme Court decision which upheld Article 134, categorically refused to follow *Avrech*. It simply offends basic notions of fairness to require plantiff to endure a possible lengthy court martial and further expect that appellate relief be sought in a tribunal which has clearly and summarily rejected the claims asserted. Indeed, at least two federal district courts have enjoined such proceedings based upon Article 134

[6] The Supreme Court has agreed to review this issue. Avrech v. Secretary of the Navy, 72-1713, 42 U.S. L.W. 3173, October 9, 1973.



specifications. *McCahill* v. *Eason, et al.,* 73-73 CIV-P, Northern District of Florida, Pensicola Division, Final Order dated June 12, 1973; *Waters* v. *Schlesinger, et al.,* C.A. 3-7766, Northern District of Texas, Dallas Division, Temporary Restraining Order and Order to Show Cause, dated October 11, 1973. In *McCahill,* Chief Judge Arnow specifically found that in view of the *Unrue* ruling "[t]o require the petitioner to exhaust his military remedies would force him to undergo a useless ordeal." This Court finds that reasoning persuasive.

### Access to Documents and Conduct of the Trial

Civilian defense counsel has argued that the severe limitations placed upon him and his staff will so seriously impede his ability to defend the charges as to deny DeChamplain a fair trial as guaranteed by the Sixth and Fourteenth Amendments.

It has been held, and the government has offered no apparent resistance to the fact that a successful federal prosecution for espionage, under 18 U.S.C. § 793, violations of which are incorporated into the Article 134 charges against DeChamplain, must prove that dissemination of the particular information to a foreign power would cause injury to the United States and that the information had not otherwise been made public. See *Gorin* v. *United States,* 312 U.S. 19 (1941); *United States* v. *Heine,* 151 F. 2d 813 (2d Cir. 1945). Clearly then, any vigorous defense of espionage charges requires counsel to be thoroughly familiar with the contents and nature of the documents which are central to the case and the prosecution must accordingly disclose the material to the defense. If, for the sake of maintaining the confidentiality of sensitive documents, it is unwilling to do so, it must be prepared

to forego trial. The government must be put to the choice. It may not bring serious charges against an individual and at the same time withhold crucial evidence from the accused. See *United States* v. *Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944), wherein Judge Learned Hand counseled: "[t]he government may choose; either it must leave the transactions in the obscurity from which trial will draw them, or it must expose them." Presumably in observance of that principle, the military has chosen not to introduce into evidence 15 documents produced at plaintiff's first court martial. However, as to nine others, which will comprise the core of the case against plaintiff, the military authorities have afforded Mr. Boudin only limited access. This Court can readily envision these restrictions, which have been earlier delineated, as effectively handcuffing retained civilian counsel. The Air Force has not come forward with any convincing justification, military or otherwise, for the imposition of these limitations.[7] This Court does not mean to imply that the military is powerless to obtain protective orders designed to prevent unwarranted disclosure of sensitive material, but the conditions demanded by the military are clearly excessive and abridge plaintiff's right to a fair trial.[8]

As to the issue of affording plaintiff a public trial, open to spectators and the press, the Court feels that

[7] Military appointed counsel has been permitted to review these documents but is prohibited from discussing them with the civilian defense team.

[8] The Court notes that in the recent trial of United States of America v. Russo and Ellsberg, No. 9373, United States District Court, Central District of California, Judge Byrne issued a protective order preventing public disclosure of classified matter, but permitted counsel and his staff, including experts and consultants, access to these documents subject to the terms of the protective order.



the matter need not be passed upon at this time. Indeed, the government represented to the Court that the military trial judge has indicated that should the need arise he would invoke his power under the Manual for Courts Martial and restrict the public from attending the proceedings. In view of the fact that the Sixth Amendment right to a public trial is not absolute, injunctive relief as to this point would be inappropriate.

In view of the foregoing the Defendant's Motion To Dismiss is denied.

The Court enters the following Findings of Fact and Conclusions of Law in conjunction with the Plaintiff's Motion for a Preliminary Injunction:

## Findings of Fact

1. Plaintiff, Master Sergeant in the United States Air Force, is presently under pre-trial confinement, awaiting court-martial on three charges alleging violations of Articles 92, 134 and 81 (conspiracy to violate Article 134), Uniform Code of Military Justice (herein called UCMJ).

2. Plaintiff was arrested and incarcerated by the Air Force on July 2, 1971, and has been under continual restraint since that date. He originally was tried and convicted on charges alleging violations of Articles 81, 92 and 134, Uniform Code of Military Justice, and was sentenced to dishonorable discharge, confinement at hard labor for fifteen years. The conviction and sentence were reversed on October 5, 1972 by the United States Air Force Court of Military Review (*United States* v. *DeChamplain*, ACM 21034) on the grounds that alleged inculpatory statements of the plaintiff were involuntary obtained and improperly admitted at trial. On February 16, 1973, the United States Court of Military Appeals affirmed the decision

of the Air Force Court of Military Review, 44 CMR 150.

3. On May 25, 1973, the Staff Judge Advocate, defendant Major Thomas, transmitted his Advice to the new Convening Authority, defendant Colonel Lovelace, recommending that the charges against the plaintiff, with certain amendments of the specifications, be referred to a rehearing by a general court-marital.

4. On May 31, 1973, the charges against the plaintiff were served upon him and were referred to a court-martial by defendant Colonel Lovelace. One of the three charges referred to therein alleges violations of Article 134, UCMJ, 10 U.S.C. § 934, and a second charge alleges violations of Article 81 UCMJ, 10 U.S.C. § 881, for conspiracy to violate Article 134.

5. Article 134, has been declared unconstitutional. *Avrech* v. *Secretary of the Navy*, 477 F. 2d 1237 (D.C. Cir. 1973); *Levy* v. *Parker*, 478 F. 2d 772, (3rd Cir. 1973); *Hooper* v. *Laird*, 482 F. 2d 784, (D.C. Cir. 1973)

6. On September 5, 1973, the plaintiff moved before the defendant Colonel Stanley for dismissal of the charges under Article 134. This motion was denied without opinion. Plaintiff also raised the same substantive matter before the United States Court of Military Appeals, in a Petition for Extraordinary Relief. The petition was denied in all respects on September 5, 1973 (Misc. Docket 73–46). The Air Force has refused to withdraw the charges based on Article 134.

7. On April 2, 1973, in the case of *United States* v. *Unrue*, No. 26,552, the United States Court of Military Appeals ruled in an unpublished order that it would not follow the decision of the Court in *Avrech* v. *Secretary of the Navy, supra.*



8. On July 5, 1973, plaintiff directly and through his military counsel retained Leonard B. Boudin, Esquire, civilian defense counsel. On July 6, 1973 and repeatedly thereafter plaintiff by counsel verbally and in writing requested of government trial counsel that the entire record of the prior trial, including the charges and the documents upon which petitioner's original conviction was based and upon which the present case is based, be delivered to the plaintiff's civilian defense counsel for examination and study by the latter and by members of his staff and technical consultants. Plaintiff request that a copy of the same record be made available to him personally so that he could study it, take notes, and consult with his counsel for the purposes of preparing his defense.

9. The defendants McLucas and Lovelace declined to make any of the "classified" portions of the *DeChamplain* case file information available to plaintiff's civilian defense counsel from July to September, 1973 and stated that plaintiff's civilian defense counsel would have to be "cleared" by the Air Force and by other agencies of the federal government. The defendant Stanley acquiesced in that position of the Air Force and declined to direct that copies of the entire record of the first trial be given to the plaintiff and to the civilian counsel of his choice.

10. The following restrictions have been imposed by the Air Force:

> (a) With respect to approximately fifteen documents introduced in evidence at plaintiff's first trial, plaintiff's civilian counsel would not be given copies or even access to the said documents or to that part of the trial record relating thereto. The Air Force has advised that it would seek to avoid this problem by not introducing

the said documents into evidence at the new trial.

(b) With respect to nine other documents, the plaintiff's civilian defense counsel would not be allowed to receive copies of them (or the transcript references as to subject), but would be permitted to look at the documents under severe restrictions. He would not be able to examine or retain copies of the documents in his office, but would be required to examine them in the presence of officials holding appropriate security clearances (including military defense counsel), and at a location chosen by the government. He would not be entitled to retain notes with respect to classified matters from such documents for use in his office in preparation for trial, but would have to surrender such notes to be "secured" by the government. Moreover, he would have to submit *all* his notes to government personnel for decision as to whether or not they relate to classified material and must be "secured." Finally, he could not discuss classified information with associates or consultants in his office or home; he could only discuss such information in a designated government office and then only with individuals with the proper security clearances. Nor could the plaintiff himself retain his classified notes for delivery to his civilian counsel or otherwise make written reference to the classified exhibits or to other relevant sections of the record.

(c) With respect to the nine documents referred to in sub-section (b), *supra,* no other members of plaintiff's civilian defense team, including associate attorneys, expert consultants and potential expert witnesses, would be permitted to observe such documents or even to receive second-



hand information about their contents, with the exception of one associate attorney and one legal secretary of the civilian defense counsel.

11. Plaintiff presented his demands for unlimited access and retention of documents by himself and his civilian defense counsel, and for copies of all relevant documents and of the entire record of the first trial, to the defendant Colonel Stanley in correspondence and in pretrial arguments held pursuant to Article 39(a), UCMJ in July and September, 1973. Plaintiff and his counsel voluntarily suggested a protective order against disclosure to unauthorized persons until the public trial to which he is entitled. Colonel Stanley ruled adversely to plaintiff, stating that the defense would be required to comply with all of the above restrictions. Colonel Stanley further ruled that the Air Force was required to "clear" (using its normal standards and procedures) only one (1) associate attorney or law clerk of the civilian counsel, who is the chief defense counsel, and only one (1) secretary/typist, and that no other personnel from the civilian defense counsel's law firm or any of his potential expert witnesses or consultants may know of the "classified" information in the case. Thus, several law partners and associates of the civilian defense counsel, and several technical experts and consultants requested by the defense, are being totally denied access to relevant evidence.

12. Plaintiff sought extraordinary relief from the Court of Military Appeals to correct the restrictions upon access imposed by the defendants. Such relief was denied on September 5, 1973, *supra.*

13. The Uniform Code of Military Justice does not recognize a right to bail or release of convicted defendants pending appeal. Accordingly, in the event plaintiff is convicted and is sentenced to a period of

confinement, plaintiff will have served all or a good portion of any sentence in imprisonment prior to exhaustion of his appellate remedies in the military courts. This would be in addition to the over two years that plaintiff already has spent in confinement waiting for trial, appeal, and retrial. Accordingly, unless the defendants are restrained from trying the plaintiff under the circumstances described above, the plaintiff will suffer irreparable injury.

CONCLUSIONS OF LAW

1. For the purposes of this motion, plaintiff has sufficiently met the requirements for a preliminary injunction as set forth in *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F. 2d 921 (D.C. Cir. 1958):

(a) Plaintiff has demonstrated the likelihood of his prevailing on the merits; specifically, that the military lacks jurisdiction to try him for alleged violations of Article 134 UCMJ and that civilian counsel is entitled to full access, subject to a protective order, to all documents relevant to the issues to be tried.

(b) Plaintiff has shown that he will suffer sufficient irreparable injury if the injunction is not issued.

(c) The issuance of this injunction will not substantially harm defendants.

(d) The public interest lies in favor of granting this injunction.

2. Plaintiff need not exhaust his military remedies as that would prove to be a futile and unjust requirement.

3. The preliminary injunction should be granted.

BARRINGTON D. PARKER,
*U.S. District Judge.*

Dated: November 13, 1973.

## APPENDIX B

United States District Court for the District of Columbia

(Filed November 13, 1973—James F. Davey, Clerk)

RAYMOND G. DECHAMPLAIN, PLAINTIFF
*v.*
JOHN L. MCLUCAS, SECRETARY OF THE AIR FORCE, ET AL., DEFENDANTS

Civil Action No. 1863–73

### *PRELIMINARY INJUNCTION*

This cause came on to be heard on plaintiff's motion for a preliminary injunction, and the Court having considered the entire record and having heard counsel for the parties, and the Court having made and filed its findings of fact and conclusions of law, it is this 13th day of November, 1973,

ORDERED that the defendants, John L. McLucas, Secretary of the Air Force, the Chief of Staff, Department of the Air Force, The Judge Advocate General, United States Air Force, Major Forrest W. Thomas, Colonel Hewitt E. Lovelace, Jr., and Colonel Russell A. Stanley, their agents, servants, employees, and attorneys, and all persons in active concert and participation with them, be and hereby are restrained and enjoined, pending the determination of this cause, from the following actions:

(a) Requiring plaintiff to submit to a court-martial which includes charges based upon Article

134 of the Uniform Code of Military Justice, 10 U.S.C. § 934;

(b) Prosecuting plaintiff on any and all charges without granting reasonably in advance of prosecution full and unlimited access to all documents relevant and material to the case of plaintiff, his chosen civilian defense counsel and such legal associates and assistants, subject to an appropriate protective order, as are necessary to said counsel's adequate preparation for trial. Such access is to include delivery to civilian defense counsel of a copy of the entire record of the proceedings at plaintiff's first court-martial and the documents upon which the present charges are based.

In the exercise of its discretion the Court will not require plaintiff to post security.

BARRINGTON D. PARKER,
*U. S. District Judge.*

November 13, 1973.

## APPENDIX C

United States District Court for the District of Columbia

(Filed December 12, 1973)

RAYMOND G. DECHAMPLAIN, *Plaintiff*

v.

JOHN L. MCLUCAS, SECRETARY OF THE AIR FORCE, ET AL., *Defendants*

### *NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES*

NOTICE IS HEREBY GIVEN this 12th day of December, 1973, that defendants hereby appeal to the Supreme Court of the United States from the judgment of this Court entered on the 13th day of November, 1973 in favor of plaintiff against said defendants, granting plaintiff's motion for preliminary injunction.

This appeal is taken pursuant to Title 28, United States Code, section 1252.

(S) Michael A. Katz,
MICHAEL A. KATZ,
*Assistant U.S. Attorney.*

## APPENDIX D

181946Z Dec 73.

CSAF Wash, DC
1840ABWG Richards—Gebaur AFB, Mo
Info USAF Trial Judiciary Fourth Circuit, Lowry AFB CO
LAFCS Richards—Gebaur AFB, Mo
DCASR/DCRN–1 New York, New York
Unclas JAJM
For JA. Subject: Access to classified material for civilian defense counsel in general court-martial of *U.S.* v. *MSGT Raymond G. DeChamplain*. This message is in four parts.

Part I: Reference our 061813Z Sep 73 and 051902Z Oct 73 messages, same subject.

Part II: Authority is hereby granted to permit access by the individuals named in Part III below to the classified documents and material described in both above referenced messages. Access will be subject to the same conditions contained in Part IV of the above referenced CSAF/JAJM message 061813Z Sep 73.

Part III: Authorization to permit access to the documents and classified material referenced in Part II above is granted to the following individuals:
(A) Mr. William G. Florence, SSAN, 263–74–0440:
(B) Professor Richard Falk, SSAN 573–38–9522.

Part IV: This access has been granted to the above named individuals in order that they may be available to assist the defense team as consultant/experts in subject case. Their subsequent participation in the court-martial trial of this case, such as appearing as witnesses, is a matter to be resolved by the trial court. Please insure that civilian defense counsel is appropriately notified of contents hereof.

James J. Blommers, Capt, JAJM, 35770/18 Dec 73/LA
Paul W. Buehler, Col, Asst Chief, JAJM





U.S. GOVERNMENT PRINTING OFFICE: 1974

# APPENDIX

Supreme Court, U. S.
FILED
AUG 15 1974
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1346

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JOHN L. McLUCAS, Secretary of the Air Force, ET AL.,
*Appellants*

—v.—

RAYMOND G. DeCHAMPLAIN

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

DOCKETED MARCH 4, 1974
CONSIDERATION OF JURISDICTION POSTPONED JUNE 24, 1974

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

**No. 73-1346**

---

JOHN L. MCLUCAS, Secretary of the Air Force, ET AL.,
*Appellants*

—v.—

RAYMOND G. DECHAMPLAIN

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

### Civil Action No. 1863-73

### DOCKET ENTRIES

| Date | Filings—Proceedings |
|---|---|
| **1973** | |
| Oct. 3 | Complaint, appearance, Exhibits A thru F. |
| Oct. 3 | Summons, Copies (8) and Copies (8) of Complaint issued. |
| Oct. 3 | Motion for preliminary injunction; Affidavit; Exhibits A thru D; Affidavit; Points and Authorities. |
| Oct. 16 | Stipulation extending time within which deft. may respond to pltfs' motion for preliminary injunction to 10-25-73. |
| Oct. 25 | Motion of defts. to dismiss the complaint; Points and Authorities in support and in opposition to pltf's motion for preliminary injunction; exhibits A thru D; c/m 10-25 appearance of Michael A. Katz, Ass't. U.S. Attorney. |
| Nov. 1 | Reply memorandum by pltf; exhibits A thru D; c/m 10-31-73. |
| Nov. 8 | Supplemental memorandum of points and authorities by defts. in support of motion to dismiss and in opposition to pltf's motion for preliminary injunction; exhibits E & F; c/m 11-7-73. |
| Nov. 8 | Supplemental reply memorandum by pltf. in support of motion for a preliminary injunction and in opposition to deft's motion for dismissal; c/m 11-7. |

| Date | Filings—Proceedings |
|---|---|
| 1973 | |
| Nov. 8 | Copy of notice by pltf. of amendment to motion for preliminary injunction; affidavit; attachment; c/m 11-8. |
| Nov. 9 | Plaintiff's motion for preliminary injunction taken under advisement. Defts' motion to dismiss, taken under advisement. |
| Nov. 13 | Second supplemental memorandum of points and authorities by defts. in support of motion to dismiss and in opposition to pltf's motion for preliminary injunction; c/m 11-13-73. |
| Nov. 13 | Memorandum; Findings of Fact and Conclusions of Law. Preliminary Injunction granted & enjoining defts. The Court will not require pltf. to post security. |
| Nov. 15 | Notice of appeal by defts. from Order of Nov. 13, 1973; copies to Joseph Forer, David Rein & Leonard B. Boudin. (U.S. No Fee). |
| Dec. 12 | Notice of appeal by defts to the Supreme Court of the United States from the order of November 13, 1973; c/m 12-12-73. |
| Dec. 26 | Motion of defts to extend time for docketing record on appeal; c/m 12-26-73. |
| 1974 | |
| Jan. 3 | Order extending time within which defts. may docket the record on appeal in the USCA until 2-13-74. |
| Mar. 19 | Preliminary record on appeal delivered to USCA. Receipt acknowledged. |
| Apr. 11 | Motion of pltff. for release from confinement pending appeal; Memorandum; Exhibit A, B, C & D; c/m 4-10-74. |



| Date | Filings—Proceedings |
|---|---|
| 1974 | |
| Apr. 23 | Memorandum of Points and Authorities of defts. in opposition to pltff's motion for release from confinement pending appeal; Gov't Exhibits A, B & C; c/m 4-23-74. |
| Apr. 30 | Memorandum of Points and Authorities of pltff. in support of motion for release from confinement; Exhibit A & B; c/m 4-26-74. |
| May 6 | Pltffs Motion for release pending appeal denied. |
| May 6 | Order denying motion of pltff. for release from confinement pending appeal. |
| June 28 | Certified copy of order from the Supreme Court of the United States, that further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. |

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1363

| Date | Filings—Proceedings |
|---|---|
| 1974 | |
| Mar. 19 | Certified Original Preliminary Record (no transcript). |
| Mar. 19 | 4-Appellants' motion to extend time to docket appeal until the Supreme Court has disposed of case, John L. McLucas, et al. v. Raymond G. DeChamplain, October term of 1973 in #73-1346. |
| Mar. 20 | 4-Appellee's opposition to motion to extend time to docket appeal until Supreme Court has disposed of case, John L. McLucas, et al. v. Raymond G. DeChamplain, October term of 1973 in #73-1346. |
| Mar. 25 | 4-Appellants' reply to opposition to motion for extending time to docket appeal. |
| Mar. 28 | 4-Appellee's motion for leave to file supplemental reply memorandum in opposition to Government's motion for extension of docketing time, and supplemental memorandum. |
| Apr. 1 | 4-Appellants' response to motion for leave to file supplemental reply memorandum. |
| Apr. 5 | Per Curiam order that the Clerk is directed to file appellee's supplemental reply memorandum; appellants' motion is granted and the time for docketing the record in this appeal is extended for a period of 15 days from the date of the final decision of the Supreme Court in the matter of McLucas, et al. v. DeChamplain, No. 73-1356; the motion to dismiss is denied; the appellee's motion for release pending appeal is denied without prejudice to its being submitted to the District Court. |



| Date | Filings—Proceedings |
|---|---|
| 1974 | |
| Apr. 5 | 4-Appellee's supplemental memorandum in opposition to Government motion to extend docketing time. |
| May 17 | Per Curiam order sua sponte, that the order filed April 5, 1974 is amended by striking the numbers 73-1356 in paragraph three thereof and inserting the numbers 73-1346. |

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1863-73

[Filed October 3, 1973]

RAYMOND G. DECHAMPLAIN
United States Air Force
1840th Air Base Wing
Richards-Gebaur AFB, Missouri
PLAINTIFF

*—against—*

JOHN L. MCLUCAS,
Secretary of the Air Force
Pentagon
Washington, D. C. 20330

CHIEF OF STAFF
Department of the Air Force
Pentagon
Washington, D. C. 20330

THE JUDGE ADVOCATE GENERAL
United States Air Force
Washington, D. C.

MAJOR FORREST W. THOMAS
Staff Judge Advocate
Richards-Gebaur AFB, Missouri

COLONEL HEWITT E. LOVELACE, JR.
Commander, 1840th Air Base Wing
Richards-Gebaur AFB, Missouri

COLONEL RUSSELL A. STANLEY
Military Judge
Richards-Gebaur AFB, Missouri
DEFENDANTS



## COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, for his complaint against the above-named defendants, alleges:

### FIRST CAUSE OF ACTION

1. This case arises under the Fifth and Sixth Amendments to the Constitution, and 10 U.S.C. §§ 827, 838, and 846. The Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1361, 2201, and 2202, 10 U.S.C. §§ 827, 838, 846 and the Fifth and Sixth Amendments to the Constitution.

2. Plaintiff is a Master Sergeant in the United States Air Force with an officially recorded outstanding record of service, whose enlistment expired on July 10, 1973. Plaintiff is presently under pre-trial confinement at Richards-Gebaur Air Force Base, Grandview, Missouri, awaiting court-martial on three charges alleging violations of Articles 92, 134, and 81 (conspiracy to violate Article 134), Uniform Code of Military Justice (hereinafter UCMJ).

3. The defendant, John L. McLucas, as Secretary of the Air Force is administrative head of the Air Force. The defendant Chief of Staff, USAF, is the highest military officer in the chain of command in the Air Force, and was responsible for denying to plaintiff's civilian defense counsel access to the documents upon which the charges against the plaintiff are based. The defendant, Judge Advocate General, United States Air Force, was responsible for denying permission to plaintiff's military defense counsel to represent the plaintiff in collateral matters arising out of the charges brought against him. The defendant Major Forrest W. Thomas is the Staff Judge Advocate at the 1840th Air Base Wing, Richards-Gebaur Air Force Base, and was responsible for issuing the Advice to the Convening Authority to institute court-martial proceedings against the plaintiff. The defendant Colonel Hewitt E. Lovelace, Jr. is the Commander of the 1840th Air Force Wing, Rich-

ards-Gebaur Air Force Base in Grandview, Missouri, and was the Convening Authority who directed that criminal charges against plaintiff be referred to a rehearing by a general court-martial. The defendant Colonel Russell A. Stanley is the military judge who has been assigned to preside at the court-martial of the plaintiff.

4. Plaintiff was arrested and incarcerated by the Air Force on July 2, 1971, and has been in continual incarceration since that date. He originally was tried and convicted on charges alleging violations of Articles 81, 92, and 134, Uniform Code of Military Justice (herein called "UCMJ"), and was sentenced to dishonorable discharge, confinement at hard labor for fifteen years, total forfeiture of pay and allowances, and reduction to the lowest enlisted grade. The conviction and sentence were reversed on October 5, 1972 by the United States Air Force Court of Military Review (*United States* v. *De Champlain*, ACM 21034) on the grounds that alleged inculpatory statements of the plaintiff were involuntarily obtained and improperly admitted at trial. On February 16, 1973, the United States Court of Military Appeals affirmed the decision of the Air Force Court of Military Review, 44 CMR 150.

5. On May 25, 1973, the defendant Major Thomas, as Staff Judge Advocate, transmitted his Advice to the new Convening Authority, defendant Colonel Lovelace, recommending that the charges against the plaintiff, with certain amendments of the specifications, be referred to a rehearing by a general court-martial.

6. On May 31, 1973, the charges against the plaintiff were served upon him and were referred to a court-martial by defendant Colonel Lovelace. One of the three charges referred to therein alleges violations of Article 134, UCMJ, 10 U.S.C. § 934, and a second charge alleges violations of Article 81 UCMJ, 10 U.S.C. § 881, for conspiracy to violate Article 134.

7. Plaintiff raised by motion the substantive matters specified *infra*, before defendant Colonel Stanley at Article 39(a), UCMJ pre-trial sessions on July 16-20, 1973 and September 5-7, 1973. All such motions were



decided adversely to the plaintiff. Plaintiff also raised the same substantive matters before the United States Court of Military Appeals, in a Petition for Extraordinary Relief. The Petition was denied in all respects on September 5, 1973 (Misc. Docket 73-46).

8. On March 20, 1973, the United States Court of Appeals for the District of Columbia Circuit, in an opinion by Justice Tom Clark, sitting by designation, held Article 134, UCMJ to be unconstitutionally vague. *Avrech* v. *Secretary of the Navy*, 477 F.2d 1237. On April 18, 1973, the United States Court of Appeals for the Third Circuit also held Article 134 unconstitutional. *Levy* v. *Parker*, 478 F.2d 772. And on August 3, 1973, a separate panel of the District of Columbia Circuit concurred with the *Averch* and *Levy* panels and held Article 134 to be unconstitutional. *Hooper* v. *Laird*, No. 72-1198, —— F.2d ——.

9. On September 5, 1973, the plaintiff moved before the defendant Colonel Stanley for dismissal of the charges under Article 134. This motion was denied without opinion. The Air Force has refused to withdraw the charges based on Article 134.

10. On April 11, 1973, the Air Force Court of Military Review refused to declare Article 134, UCMJ unconstitutionally vague. *United States* v. *Duncan*, ACM 21,262 en banc). On April 2, 1973, in the case of *United States* v. *Unrue*, No. 26,552, the United States Court of Military Appeals ruled in an unpublished order that it would not follow the decision of the court in *Avrech* v. *Secretary of the Navy*, *supra*. A copy of that order is attached hereto as Exhibit "B."

11. In the absence of relief from this Court, plaintiff will be required to submit to a court-martial on unconstitutional charges. Requiring the plaintiff to go to trial on these unconstitutional charges, joined with other charges as shown in Exhibit "A," will seriously prejudice plaintiff's right to a fair trial on the charges brought under sections of the Uniform Code of Military Justice other than Article 134.

12. The Uniform Code of Military Justice does not recognize a right to bail or release of convicted defend-

ants pending appeal. Accordingly, in the event plaintiff is convicted under the Article 134 charges and is sentenced to a period of confinement on those charges, plaintiff will have served all or a good portion of any sentence in imprisonment prior to exhaustion of his appellate remedies in the military courts. This would be in addition to the over two years that plaintiff already has spent in confinement waiting for trial, appeal, and retrial.

13. Accordingly, unless the defendants are restrained from trying the plaintiff on charges under Article 134, the plaintiff will suffer irreparable injury.

14. The plaintiff has exhausted his administrative remedies and has no remedy at law.

## SECOND CAUSE OF ACTION

15. Plaintiff repeats and realleges the contents of Paragraphs 1-7, *supra.*

16. On July 5, 1973, plaintiff directly and through his military counsel retained Leonard B. Boudin, Esq., a member of the New York State, United States Supreme Court, and other federal bars, including the bar of this court as his civilian defense counsel. On July 6, 1973 and repeatedly thereafter plaintiffs by counsel verbally and in writing requested of government trial counsel that the entire record of the prior trial, including the charges and the documents upon which petitioner's original conviction was based and upon which the present case is based, be delivered to the plaintiff's civilian defense counsel for examination and study by the latter and by members of his staff and technical consultants. Plaintiff requested that a copy of the same record be made available to him personally so that he could study it, take notes, and consult with his counsel for the purposes of preparing his defense.

17. The defendants McLucas and Lovelace declined to make any of the "classified" portions of this information available to plaintiff's civilian defense counsel from July to September, 1973 and stated that plaintiff's civilian defense counsel would have to be "cleared" by the Air



Force and by other agencies of the federal government. The defendant Stanley acquiesced in that position of the Air Force and declined to direct that copies of the entire record of the first trial be given to the plaintiff and to the civilian counsel of his choice.

18. On or about September 20, 1973, the Air Force trial counsel (prosecutor) advised the plaintiff's military counsel of a final decision by the Air Force as follows:

(a) With respect to approximately fifteen documents introduced in evidence at plaintiff's first trial, plaintiff's civilian counsel would not be given copies or even access to the said documents or to that part of the trial record relating thereto. The Air Force has advised that it would seek to avoid this problem by not introducing the said documents into evidence at the new trial.

(b) With respect to nine other documents, the plaintiff's civilian defense counsel would not be allowed to receive copies of them (or the transcript references as to subject), but would be permitted to look at the documents under severe restrictions. He would not be able to examine or retain copies of the documents in his office, but would be required to examine them in the presence of officials holding appropriate security clearances (including military defense counsel), and at a location chosen by the government. He would not be entitled to retain notes with respect to classified matters from such documents for use in his office in preparation for trial, but would have to surrender such notes to be "secured" by the government. Moreover, he would have to submit *all* his notes to government personnel for decision as to whether or not they relate to classified material and must be "secured." Finally, he could not discuss classified information with associates or consultants in his office or home; he could only discuss such information in a designated government office and then only with individuals with the proper security clearances. Nor could the plaintiff himself retain his classified notes for delivery to his civilian counsel or otherwise make written reference to the classified exhibits or to other relevant sections of the record.

(c) With respect to the nine documents referred to in sub-section (b), *supra*, no other members of plaintiff's civilian defense team, including associate attorneys, expert consultants and potential expert witnesses, would be permitted to observe such documents or even to receive second-hand information about their contents, with the exception of one associate attorney and one legal secretary of the civilian defense counsel.

19. The above-stated restrictions were dictated by the defendant Chief of Staff of the United States Air Force in a telegram sent on September 7, 1973 to the defendant Convening Authority, A copy of that telegraphic message is attached hereto as Exhibit "C."

20. As a result of the above-stated restrictions, even the full charge sheet was not disclosed to civilian defense counsel; only after strong objection by the defense to the "classified" designation of all the charge sheets was an "expurgated" version supplied to the defense.

21. The Air Force has crossed out from the charge sheet references to certain documents to which access has been denied to the plaintiff's civilian defense counsel. The Air Force now takes the position that these documents must be withdrawn from the charges. See letter of September 21, 1973 from Captain Peter N. Rogers, military trial counsel, to Leonard B. Boudin, civilian defense counsel, attached hereto as Exhibit "D." The charge sheet attached hereto as Exhibit "A" contains the markings by which the references to documents were crossed out.

22. Plaintiff presented his demands for unlimited access and retention of documents by himself and his civilian defense counsel, and for copies of all relevant documents and of the entire record of the first trial, to the defendant Colonel Stanley in correspondence and in pretrial arguments at the Article 39(a) sessions in July and September, 1973. Plaintiff and his counsel voluntarily suggested a protective order against disclosure to unauthorized persons until the public trial to which he is entitled. Colonel Stanley ruled adversely to plaintiff, stating that the defense would be required to comply with all of the above restrictions, as well as all other



unspecified Air Force security regulations. (There are however no Department of Defense or Air Force regulations restricting the right of court-martial defense counsel to relevant exhibits.) Colonel Stanley further ruled that the Air Force was required to "clear" (using its normal standards and procedures) only one (1) associate attorney or law clerk of the civilian counsel, who is the chief defense counsel, and only one (1) secretary/typist, and that no other personnel from the civilian defense counsel's law firm or any of his potential expert witnesses or consultants may know of the "classified" information in the case. Thus, several law partners and associates of the civilian defense counsel, and several technical experts and consultants requested by the defense, are being totally denied access.

23. These actions by the defendants violate the plaintiff's right to a fair trial, to the effective assistance of counsel and to due process of law, and interfere with his ability to obtain witnesses and other evidence guaranteed him by the Fifth and Sixth Amendments to the Constitution of the United States and Articles 27, 38 and 46 of the UCMJ, 10 U.S.C. §§ 827, 838, 846.

24. In the absence of relief from this Court, plaintiff will be required to submit to a court-martial under circumstances presenting clear, unmistakable, and substantial interferences with his constitutional rights. The Uniform Code of Military Justice does not recognize a right to bail or release of convicted defendants pending appeal. Accordingly, in the event plaintiff is convicted and is sentenced to a period of confinement on those charges, plaintiff will have served all or a good portion of any sentence in imprisonment prior to exhaustion of his appellate remedies in the military courts and possible return to the federal civilian courts. This would be in addition to the over two years that plaintiff already has spent in confinement waiting for trial, appeal, and retrial.

25. Accordingly, unless the defendants are restrained from trying the plaintiff under the circumstances described herein, plaintiff will suffer irreparable injury.

26. The plaintiff has exhausted his administrative remedies and has no remedy at law.

## THIRD CAUSE OF ACTION

27. Plaintiff repeats and realleges the contents of paragraphs 1-7, *supra.*

28. The original court-martial was conducted in part in closed sessions, particularly when the "classified" documents which are the basis of this prosecution were introduced in evidence and were the subject of testimony, and when so-called confidential informants testified or were referred to in testimony. Plaintiff moved at the Article 39(a), UCMJ hearings on July 16, 1973 and on September 5, 1973 for an order directing that plaintiff be given a public trial, open to spectators and members of the press regardless of security clearance and their so-called "need to know."

29. These motions were denied by the Military Judge, defendant Colonel Stanley, pursuant to Paragraph 53(e) of the Manual for Courts-Martial. He ruled that sessions of the trial would be closed when classified matters in the case were being disclosed or discussed.

30. The denial of plaintiff's demand for a public trial violates his constitutional right to a public trial under the Fifth and Sixth Amendments to the Constitution of the United States. Paragraph 53(e) of the Court-Martial Manual, as applied by the Military Judge, violates those constitutional provisions and Article 36(a) of the UCMJ.

31. In the absence of relief from this Court, plaintiff will be required to submit to a court-martial under circumstances presenting clear and unmistakable interferences with his constitutional rights. The Uniform Code of Military Justice does not recognize a right to bail or release of convicted defendants pending appeal. Accordingly, in the event plaintiff is convicted and is sentenced to a period of confinement on these charges, plaintiff will have served all or a good portion of any sentence in imprisonment prior to exhausting of his appellate remedies in the military courts and return to the federal civilian courts. This would be in addition to the over two years that plaintiff already has spent in confinement waiting for trial, appeal, and retrial.



32. Accordingly, unless the defendants are restrained from trying the plaintiff under the circumstances described herein, the plaintiff will suffer irreparable injury.

33. The plaintiff has exhausted his administrative remedies and has no remedy at law.

## FOURTH CAUSE OF ACTION

34. Plaintiff repeats and realleges the contents of paragraphs 1-7, *supra.*

35. Article 27, UCMJ, 10 U.S.C. § 827, requires the assignment of military defense counsel for general and special courts-martial.

36. Air Force Regulation 110-3, paragraph 2, as interpreted by the defendant Judge Advocate General, USAF, forbids a military lawyer who has been assigned by The Judge Advocate General as military defense counsel to appear as counsel for the accused in civil courts in collateral proceedings arising out of the court-martial charges (such as the instant proceedings), unless special permission is obtained from the Judge Advocate General, USAF.

37. On July 23, 1973, plaintiff's two assigned military defense counsel, Captain Byron D. Baur, USAF, and Captain Alessandro J. Ranciglio, USAF, requested permission to represent the plaintiff in collateral proceedings which they felt were essential to protect the plaintiff's constitutional and statutory rights. A copy of their letter of request is attached as Exhibit "E" hereto.

38. On July 31, 1973, Brig. Gen. Harold R. Vague, the Assistant Judge Advocate General, USAF, denied the request of the plaintiff and his military defense counsel. A copy of the letter from General Vague to plaintiff's chief military defense counsel, Capt. Byron D. Baur, is attached as Exhibit "F" hereto.

39. Plaintiff requires the assistance of his military defense counsel to assist in the preparation of collateral proceedings such as the instant proceeding, and also a possible proceeding to be brought in the United States District Court in Missouri challenging the plaintiff's

pre-trial confinement. Considerations of practical convenience and financial resources make it difficult if not impossible for plaintiff to retain civilian counsel to represent him fully and adequately in all such matters. Failure to receive such assistance of military counsel will seriously prejudice the plaintiff's ability to present a full defense to the criminal charges that have been brought against him.

40. Accordingly, unless the defendants are restrained from forbidding the plaintiff's military defense counsel from representing him in civil collateral proceedings arising from the criminal charges brought against him, the plaintiff will suffer irreparable injury.

41. The military courts have held that they lack jurisdiction to decide the question of military defense counsel appearing in civilian courts. *Johnson* v. *The Judge Advocate General of the United States Army*. 45 CMR 294 (1972). In the instant case, the defendant Judge Advocate General, USAF, has denied relief. Thus, the plaintiff has exhausted his available administrative remedies and has no remedy at law.

WHEREFORE, the plaintiff requests the following relief:

1. That the Court issue a declaratory judgment:

A. That Article 134, UCMJ, 10 U.S.C. § 934, is unconstitutionally vague, in violation of the due process clause of the Fifth Amendment to the Constitution.

B. That the actions of the defendants in proceeding to trial by court-martial of the plaintiff without granting the plaintiff and his civilian counsel full and unlimited access, subject to a protective order, to all documents relevant and material to issues to be tried, including the receipt of a copy of the entire record of plaintiff's prior court-martial and the very documents upon which the present and past charges are based, violate plaintiff's Fifth and Sixth Amendment rights to due process of law, a fair and speedy trial, the right to call and cross-examine witnesses, and the effective assistance of counsel of his choice.



C. That the actions of the defendants in proceeding to trial by court-martial of the plaintiff pursuant to an order whereby the trial will be closed to the public and the press whenever classified matters in the case are disclosed or discussed, violate plaintiff's Fifth and Sixth Amendment rights to due process of law and to a fair and speedy public trial.

D. That Air Force Regulation 110-3, Paragraph 2, on its face and as applied, violates the plaintiff's Fifth and Sixth Amendment rights to due process of law, to a fair trial, and to adequate assistance of counsel.

2. That the Court issue a preliminary and permanent injunction enjoining the defendants from prohibiting the plaintiff's military defense counsel from rendering legal assistance and appearing for the plaintiff in matters before civil courts of the United States on collateral issues arising from the criminal charges brought against the plaintiff;

3. That the Court issue a preliminary and a permanent injunction:

A. Enjoining prosecution of the plaintiff pursuant to charges 1 and 3 of the present charge sheet, which allege violations of Article 134, UCMJ, 10 U.S.C. § 934, and Article 81, UCMJ, 10 U.S.C. § 881 (conspiracy to violate Article 134).

B. Enjoining prosecution of the plaintiff pursuant to any and all charges, unless full and unlimited access to all documents relevant and material to the case, including receipt of copies of the entire record of the proceedings at plaintiff's first court-martial and the documents upon which the present and past charges are or have been based, is granted immediately to plaintiff, his chosen civilian defense counsel, and such legal associates and assistants as are appropriate to that counsel's adequate preparation for trial.

C. Enjoining prosecution of the plaintiff pursuant to any and all charges unless a fully open public trial is immediately guaranteed to the plaintiff.

4. Granting such other and further relief as this Court may deem appropriate.

/s/ Leonard B. Boudin
LEONARD B. BOUDIN
ERIC M. LIEBERMAN
RABINOWITZ, BOUDIN & STANDARD
Attorneys for Plaintiff
30 East 42nd Street
New York, New York 10017
(212) OX7-8640

/s/ Joseph Forer
JOSEPH FORER
FORER AND REIN
430 National Press Building
Washington, D.C. 20004
(202) 628-4047

September 26, 1973.



[Title Omitted in Printing]

VERIFICATION

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

LEONARD B. BOUDIN, being duly sworn, deposes and says:

I am one of the attorneys for the plaintiff in the above action. I have read the foregoing Complaint and I verily believe the facts stated herein to be true.

/s/ Leonard B. Boudin
LEONARD B. BOUDIN

Subscribed and sworn to before me,
this 26th day of September, 1973.

/s/ Herbert Jordan
Notary Public
HERBERT JORDAN
Notary Public, State of New York
No. 31-4506453 Qual. in N. Y. County
Commission Expires March 30, 1975

CHARGE I Violation of the Uniform Code of Military Justice, Article 81.

Specification: In that MASTER SERGEANT RAYMOND G. DE CHAMPLAIN, United States Air Force, Detatchment 8, 1131 Special Activities Squadron, Headquarters Command, being a member of the United States Air Force, did, at Bangkok, Thailand, on or about 6 June 1971, conspire with another to commit an offense under Article 134, Uniform Code of Military Justice, to wit: to wrongfully communicate to an agent of a foreign government, then known by the said MASTER SERGEANT RAYMOND G. DE CHAMPLAIN to be an agent of a foreign government, information known by the said Master Sergeant Raymond G. deChamplain to have been classified as affecting the security of the United States in violation of Section 783(b), Title 50, United States Code, and in order to effect the object of the conspiracy, the said Master Sergeant Raymond G. de Champlain did, on 2 July 1971, wrongfully attempt to communicate to an agent of a foreign government information which was then known by the said Master Sergeant Raymond G. de Champlain to have been classified as affecting the security of the United States, to wit:

a. A four page typewritten copy of Top Secret Department of State Memorandum of Conversation, dated 9 June 1971, Subject: Meeting between Ambassador Unger and Secretary of the Air Force, Robert C Seamans, Jr.

b. A two page typewritten copy of Top Secret electrical message 300400Z JUN 71 from CINCPAC to RUEKJCS/JCS. Subject: Military Ceiling in Thailand.

c. A two page reproduced copy of Top Secret SPECAT electrical message 170152Z APR 71, from CINCUSARPAC to RUEOCP/COPO WASH DC, Subject: PSYOP OFF FOR 46TH SF CO (ABN), APO 96261.

d. A five page reproduced copy of Secret electrical message 201230Z JUN 71 from COMUSMACTHAI (ADVANCED) PHITSANULOKE THAI to RUEFHQA/CSAF/XOOW/XCOS, Subject: Pave Coin Major Aircraft Accident Report.

e. A Confidential Airgram, dated 15 June 1971 from American Embassy, Bangkok to Department of State, Subject: Vietnamese Refugees.

f. A reproduced copy of Confidential Memorandum for Bureau of Narcotics and Dangerous Drugs, US Embassy, Bangkok, Thailand, Subject: Opium Traffic in Burma.

g. A reproduced copy of Confidential electrical message 280513 JUN 71 from COMUSMACTHAI to CINCPAC, Subject: RTG PSYOP Programs.

h. A two page Confidential electrical message 300130Z JUN 71 from 5AF FUCHU AS JAPAN to RUHHABA/CINCPACAF, Subject: Request for Area Clerance Col Titus plus One.

i. A confidential Department of State Memorandum of Conversation dated June 14, 1971.

j. A four page copy of Confidential electrical message 270114Z JUN 71 from CINCPAC, Subject: Planning for Redeployment of RTAVF.

k. A two page reproduced copy of Confidential DA Form 2496, dated 25 June 1971, from TMAG to AC of S, J-1.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 92.

Specification: In that MASTER SERGEANT RAYMOND G. DE CHAMPLAIN, United States Air Force, Detatchment 8, 1131 Special Activities Squadron, Headquarters Command, did, at Bangkok, Thailand, on or about 6 June 1971, violate a lawful general regulation, to wit: paragraph 2, Air Force Regulation 205-57, 14 October 1963, by failing to report to his commander or supervisor, a personal contact with a



BEST COPY AVAILABLE

EXHIBIT "A"

representative of a foreign government, known by the said Master Sergeant Raymond G. deChamplain to have been a representative of a foreign government, whose activities are hostile to, against the best interest of or may be harmful to the United States.

CHARGE III: Violation of the Uniform Code of Military Justice, Article 134.

Specification 1: In that MASTER SERGEANT RAYMOND G. DECHAMPLAIN, United States Air Force, Detatchment 8, 1131 Special Activities Squadron, Headquarters Command, for the purpose of obtaining information respecting the national defense, having reason to believe the information was to be used to the injury of the United States or to the advantage of a foreign nation, did, at Bangkok, Thailand, on or about 30 June 1971, wrongfully and in violation of Section 793(b), Title 18, United States Code, copy classified security documents connected with the national defense, to wit:

a. A four page Top Secret Department of State Memorandum of Conversation, dated 9 June 1971, Subject: Meeting between Ambassador Unger and Secretary of the Air Force, Robert C Seamans, Jr.

b. A two page Top Secret electrical message 300400Z JUN 71 from CINCPAC to RUEKJCS/JCS, Subject: Military Ceiling in Thailand.

c. A Top Secret electrical message 240231Z JUN 71 from CINCPAC to RHMSMVA/CHMEDTC, Subject is Classified Top Secret.

d. A two page Top Secret SPECAT electrical message 170152Z APR 71, Subject: PSYOP OFF FOR 46TH SF CO (ABN), APO 96261.

e. A five page Secret electrical message 201230Z JUN 71 from COMUSMACTHAI (ADVANCED) PHITSANULOKE THAI to RUEFHQA/CSAF/XOOW/XOOS, Subject: Pave Coin Major Aircraft Accident Report.

f. A Confidential electrical message 280513Z JUN 71 from COMUSMACTHAI to CINCPAC, Subject: RTG PSYOP Programs.

Specification 2: In that MASTER SERGEANT RAYMOND G. DECHAMPLAIN, United States Air Force, Detatchment 8, 1131 Special Activities Squadron, Headquarters Command, having lawful access to classified security documents relating to the national defense and having reason to believe the information contained in these documents could be used to the injury of the United States or to the advantage of a foreign nation, did, at Bangkok, Thailand, on 2 July 1971, wrongfully and in violation of Section 793(d) of Title 18, United States Code, willfully attempt to deliver to a person not authorized to receive them, copies of classified security documents relating to the national defense, described as follows:

a. A four page typewritten copy of Top Secret Department of State Memorandum of Conversation, dated 9 June 1971, Subject: Meeting between Ambassador Unger and Secretary of the Air Force, Robert C Seamans, Jr.

b. A two page typewritten copy of Top Secret electrical message 300400Z JUN 71 from CINCPAC to RUEKJCS/JCS, Subject: Military Ceiling in Thailand.

c. A reproduced copy of Top Secret electrical message 240231Z JUN 71 from CINCPAC to RHMSMVA/CHMEDTC.

d. A two page reproduced copy of Top Secret SPECAT electrical message 170152Z APR 71 from CINCUSARPAC to RUEAOCP/COPO WASH DC, Subject: PSYOP OFF FOR 46TH SF CO (ABN), APO 96261.

e. A five page reproduced copy of Secret electrical message 201230Z JUN 71 from COMUSMACTHAI (ADVANCED) PHITSANULOKE THAI to RUEFHQA/CSAF/XOOW/XOOS, Subject: Pave Coin Major Aircraft Accident Report.

f. A Confidential airgram, dated 15 June 1971 from American Embassy,

g. A reproduced copy of Confidential Memorandum for Bureau of Narcotics and Dangerous Drugs, US Embassy, Bangkok, Thailand, Subject: Opium Traffic in Burma.

h. A reproduced copy of Confidential electrical message 280513Z JUN 71 from COMUSMACTHAI to CINCPAC, Subject: RTG PSYOP Programs.

i. A two page Confidential electrical message 300130Z JUN 71 from 5AF FUCHU AS JAPAN to RUHHABA/CINCPACAF, Subject: Request for Area Clearance Col Titus plus one.

j. A Confidential Department of State Memorandum of Conversation dated June 14, 1971.

k. A four page copy of Confidential electrical message 270114Z JUN 71 from CINCPAC, Subject: Planning for Redeployment of RTAVF.

l. A two page reproduced copy of Confidential DA Form 2496, dated 25 June 1971 from TNAC to AC of S, J-1.

EXHIBIT B

UNITED STATES COURT OF MILITARY APPEALS

No. 26,552

UNITED STATES, APPELLEE

*v.*

Specialist Four TERRY W. UNRUE (SS #233-80-9730), APPELLANT

ORDER

With due regard for the position of the United States Court of Appeals for the District of Columbia in Averch v. Secretary of the Navy, —— F. 2d —— (D. C. Cir. 1973), this Court considers itself bound by the decision of the United States Supreme Court that the legislative predecessor of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, was constitutional. Dynes v. Hoover, 61 U.S. 65, 15 L. Ed. 838, 20 How. 65 (1858). See also United States v. Frantz, 2 U.S.C.M.A. 161, 7 C.M.R. 37 (1953); United States v. Sadinsky, 14 U.S. C.M.A. 563, 34 C.M.R 343 (1964); and United States v. Pitosi, 20 U.S.C.M.A. 601, 44 C.M.R. 31 (1971).

Accordingly, it is, by the Court, this 2d day of April, 1973,

ORDERED:

That the defense "Motion for Enlargement of the Scope of the Granted Issue" be, and the same hereby is denied; and it is further

ORDERED:

That the "Motion for Enlargement of the Filing of the Final Brief Under Rule 43 of the Granted Issue," be, and the same hereby is, granted, up to and including April 6, 1973.

Judge Duncan would grant the motion and order oral argument on the issue presented.

For the Court

/s/ Michael W. Katen
MICHAEL W. KATEN
Clerk



EXHIBIT C

7 Sep 73 0255

CZCHWA 241
PTTUZF DW RUEBDUA2898 2492032-UUUU—
RUWTWHA.
ZNR UUUUUU
P R 061813Z SEP 73 ZFD
FM CSAF WASH DC
TO RUKTAAA/1840 ABWG RICHARDS-GEBAUR
AFB MO
INFO RUWTFJA/USAF TRIAL JUDICIARY
FOURTH CIRCUIT LOWRY CO
RUKTAAA/AFCS RICHARDS-GEBAUR AFB MO
BT

B+BT

FOR JA. SUBJECT: ACCESS TO CLASSIFIED MATERIAL FOR CIVILIAN DEFENSE COUNSEL IN GENERAL COURT-MARTIAL OF U.S. V. MSGT RAYMOND G. DECHAMPLAIN. THIS MESSAGE IN FIVE PARTS.

PART I: DECISIONS OF THE UNITED STATES COURT OF MILITARY APPEALS REQUIRE THAT THE ACCUSED'S RIGHT TO REPRESENTATION BEFORE COURTS-MARTIAL BY CIVILIAN COUNSEL INCLUDE RIGHT OF CIVILIAN COUNSEL TO HAVE ACCESS TO ALL PERTINENT EVIDENCE EVEN IN A TRIAL INVOLVING CLASSIFIED INFORMATION.

PART II: TO PROVIDE THIS RIGHT TO THE ACCUSED IN SUBJECT CASE, AUTHORITY IS HEREBY GRANTED TO PERMIT ACCESS BY THE INDIVIDUALS NAMED IN PART V BELOW TO THE FOLLOWING CLASSIFIED DOCUMENTS ALLEGED IN THE SPECIFICATION OF CHARGES REFERRED FOR REHEARING IN THIS CASE TOGETHER WITH ALL PORTIONS OF THE ORIGINAL RECORD OF TRIAL WHICH RELATE TO THOSE DOCUMENTS:

| TOP SECRET ORIGINATOR | SUBJECT | DATE |
|---|---|---|
| US EMBASSY, BANGKOK | MEMO OF CONVERSATION | |
| POMIL AMEMB | BETW AMB UNGER AND DR SEAMANS (SAF) | 9 JUN 71 |

| SECRET ORIGINATOR | SUBJECT | DATE |
|---|---|---|
| CINCPAC/J3B 6 | SUBJECT SECRET | 240231Z JUN 71 |
| COMUSMACTHAI (ADVANCED) | PAVE COIN MAJOR A/C | 201230Z JUN 71 |
| PHITSANULOKE, THAI | ACCIDENT REPORT | |

| CONFIDENTIAL ORIGINATOR | SUBJECT | DATE |
|---|---|---|
| CINUSARPAC/GPPPE-MO | PSYOP OFF FOR 46TH SF CO (ABN), APO 96261 | 170152Z APR 71 |
| USMACTHAI/TNAG | DISPOSITION FORM: DEVELOPMENTS IN THAI STRENGTH REPORT | 25 JUN 71 |

| ORIGINATOR | SUBJECT | DATE |
|---|---|---|
| AM EMBASSY, BANGKOK/POL 4 | VIETNAMESE REFUGEES (AIRGRAM) | 15 JUN 71 |
| AM EMBASSY, BANGKOK | MEMO OF CONVERSATION-SIRI UDORN HOTEL, UDORN, THAI | 14 JUN 71 |
| 5 AF, FUCHU AS, JAPAN/CS | REQUEST FOR AREA CLEARANCE-COL TITUS PLUS ONE | 3001302 JUN 71 |
| CINCPAC OASD: ISA | PLANNING FOR REDEPLOYMENT OF RTAVF | 270114Z JUN 71 |

PART III: IN THE DISCRETION OF THE CONVENING AUTHORITY, THE SPECIFICATION OF CHARGES REFERRED FOR REHEARING MAY BE



AMENDED TO DELETE THEREFROM ALLEGATIONS OF DOCUMENTS TO WHICH ACCESS BY CIVILIAN DEFENSE COUNSEL IS NOT GRANTED BY THIS MESSAGE.

PART IV: ACCESS TO THE DOCUMENTS AND OTHER CLASSIFIED MATERIAL DESCRIBED IN PART II ABOVE IS GRANTED ONLY ON THE FOLLOWING CONDITIONS: (A) THE DOCUMENTS MAY NOT BE RELEASED TO CIVILIAN COUNSEL; (B) THEY MAY SEE AND READ THE DOCUMENTS ONLY IN THE PRESENCE OF ONE HOLDING THE APPROPRIATE SECURITY CLEARANCE; (C) THEY MAY NOT MAKE COPIES OF THE DOCUMENTS; (D) NO WRITTEN NOTES MADE BY THEM WITH RESPECT TO CLASSIFIED INFORMATION CONTAINED IN SAID DOCUMENTS MAY BE REMOVED FROM AIR FORCE CONTROL; AND (E) THEY WILL BE ADVISED OF APPLICABLE LAWS AND PENALTIES FOR UNAUTHORIZED RELEASE OF CLASSIFIED INFO. TRIAL COUNSEL WILL AT THE EARLIEST OPPORTUNITY REQUEST THE MILITARY JUDGE TO INFORM CIVILIAN DEFENSE COUNSEL IN OPEN COURT OF THE CONDITIONS IMPOSED AND OBTAIN THEIR ACKNOWLEDGEMENT THEREOF, AND IF PRACTICABLE THEIR AGREEMENT TO COMPLY WITH SUCH CONDITIONS.

PART V: AUTHORIZATION TO PERMIT ACCESS TO THE DOCUMENTS AND OTHER CLASSIFIED MATERIAL DESCRIBED IN PART II ABOVE IS LIMITED TO THE FOLLOWING INDIVIDUALS: (A) MR LEONARD B. BOUDIN; (B) MR MICHAEL KRINSKI; AND (C) MR JEROME J CHARLES.

BT

#2392

EXHIBIT D

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS UNITED STATES AIR FORCE
Washington, D. C.

21 Sep 73 [DoD Emblem]

Mr. Leonard B. Boudin
Rabinowitz, Boudin & Standard
Attorneys at Law
30 East 42nd Street
New York, NY 10017

Dear Mr. Boudin:

Attached please find the requested message and copy of charges. The subparagraphs lined out in red relate to documents to which you have not been granted access. It is the position of the government that these subparagraphs must be withdrawn from the charges.

Sincerely,

/s/ Peter N. Rogers
PETER N. ROGERS
Capt, USAF
Trial Counsel
4 Judiciary Circuit

2 Atchs
1. Msg, CSAF, 061813Z Sep 73
2. Charges, U.S. v. Dechamplain



EXHIBIT E

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS UNITED STATES AIR FORCE
Washington, D. C.

23 July 1973 [DoD Emblem]

Reply to
Attn of:

Subject: Representation of Our Court-Martial Client in Actions Collateral to His Court-Martial; U. S. v. MSgt Raymond G. DeChamplain

To: The Judge Advocate General
United States Air Force
Washington DC

1. Reference my earlier letter, as co-signer with Captain James R. Crassweller, on the same basic subject, dated 7 May 1973, addressed to Colonel George M. Wilson, Hq USAF (JAJD), for presentation to The Judge Advocate General. It is my understanding that Captain Crassweller received a reply, dated 21 May 1973, signed on behalf of The Judge Advocate General by Colonel W. M. Burch II, Director, USAF Judiciary, as well as telephonic reply and instructions from Colonel Burch's office. It is my further understanding that these replies to Captain Crassweller denied our joint request, insofar as it applied to him. I received no reply directed to me, or a copy of the reply to Captain Crassweller. Therefore, I am re-initiating my request by means of this letter, and in addition requesting that my Assistant Defense Counsel, Captain Alexandro J. Ranciglio, be likewise freed to participate as counsel in actions on behalf of our client in all legal actions relating to the defense of our client, regardless of the tribunal involved.

2. Captain Ranciglio and I are both duly licensed attorneys, admitted to practice before the Federal District Courts of our home states. In Captain Ranciglio's case, he is admitted to practice before the Federal District

Court for the Western District of Missouri, which is the very court in which any action on behalf of our client might well be brought. It is only because of the prohibitions against judge advocates acting as counsel in such actions, contained in paragraph 2, AFR 110-3, that we are denied permission to seek collateral relief, where appropriate, on behalf of our client. As a result, our client, who is severely in debt, may have to pay for the services of his civilian counsel to come to Missouri to bring such action, even though his military lawyers are fully qualified under the appropriate court's rules and are already on-the-scene and very familiar with the case.

3. Presently, as a result of rulings made by the Military Judge in an Article 39(a) UCMJ, pre-trial hearing held 16-20 July 1973, at Richards-Gebaur AFB, Missouri, several important issues, some of constitutional magnitude, face the defense. Requests for relief in the form of "collateral attack" in federal district court or higher federal court, may be appropriate. The individual civilian defense counsel, Mr. Leonard B. Boudin, of New York City, has specifically requested that Captain Ranciglio and I act as the accused's counsel in bringing such "collateral attacks", if they are deemed necessary. Therefore, we hereby request the authority to appear as counsel and to represent our client in any judicial tribunal or other appropriate proceedings, when the outcome of the action involved relates directly to the military charges pending against our accused, or when the action involved will affect our accused's situation as a criminal defendant (such as Habeas Corpus actions seeking relief from pre-trial confinement or restriction). We specifically request waiver from the prohibitions of paragraph 2, AFR 110-3, or, alternatively, the issuance of an Opinion of The Judge Advocate General, that that paragraph abridges the accused's right to counsel under Articles 27 and 38, UCMJ, 10 U. S. Code Sec. 827, and/or the Sixth Amendment to the Constitution of the United States.

4. We respectfully request a prompt determination of this matter and written reply, in order that we may



know whether we are to be permitted to act as counsel to our client in such proceedings in the near future. We further request that the reply address itself to the propriety of our taking similar action on behalf of other accuseds for whom we have been appointed military defense counsel.

Respectfully submitted,

BYRON D. BAUR
Captain, USAF
Defense Counsel
4 Judiciary Circuit
Lowry AFB CO 80230

1 Atch
DC Ltr dtd 7 May 73

Cy to: Capt A. J. Ranciglio (ADC)
Mr. Leonard B. Boudin
MSgt Raymond G. DeChamplain

EXHIBIT F

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS UNITED STATES AIR FORCE
Washington, D. C.
20314

31 Jul 1973 [DoD Emblem]

Reply to
Attn of: JA

Subject: Request for Authority to Appear in District Court

To: 4th Judicial Circuit (Capt Baur)

1. Reference your letter, 23 July 1973, subject "Representation of Our Court-Martial Client in Actions Collateral to His Court-Martial; U.S. v. MSgt Raymond G. DeChamplain".

2. You have earlier been advised that you are not authorized to practice in federal district court incident to your representation of military personnel under Article 27, UCMJ. No exception to that principle applies in the case of Master Sergeant DeChamplain. Further, it is *not* the opinion of The Judge Advocate General that AFR 110-3 is invalid, whether for the reasons you suggest or for any other reasons. On the contrary, it is a proper limitation of the activities of Air Force judge advocates. The accused is assuredly entitled to the employment of counsel for any legal procedure which he desires to undertake. There is no obligation upon the United States to supply his counsel except to the extent authorized by law and regulation.

3. With respect to paragraph 4 of your letter, you are advised that, absent special circumstances which would warrant a different determination, this will also apply to your representation of other personnel whom you are



assigned to defend under Article 27 or whom you defend as individual military counsel under Article 38(b).

/s/ Harold R. Vague
HAROLD R. VAGUE
Brigadier General, USAF
The Assistant Judge Advocate General
United States Air Force

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed October 3, 1973]

[Title Omitted in Printing]

## PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Upon the complaint herein, the attached affidavits of Leonard B. Boudin and Captain Byron D. Baur, USAF, and the accompanying memorandum of law, plaintiff moves this court to grant a preliminary injunction:

A. Enjoining the defendants, their agents, servants, employees, attorneys and all persons in active concert and participation with them, pending the final hearing and determination of this action, from requiring the plaintiff to submit to a court-martial which includes charges based upon Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934;

B. Enjoining the defendants, their agents, servants, employees, attorneys, and all persons in active concert and participation with them, pending the final hearing and determination of this action, from prosecuting the plaintiff pursuant to any and all charges, unless full and unlimited access to all documents relevant and material to the case, including delivery to civilian defense counsel of a copy of the entire record of the proceedings at plaintiff's first court-martial and the documents upon which the present and past charges are or have been based, is granted immediately to plaintiff, his chosen civilian defense counsel, and such legal associates and assistants as are appropriate to that counsel's adequate preparation for trial.

C. Enjoining the defendants, their agents, servants, employees, attorneys, and all persons in active concert and participation with them, pending the final hearing and determination of this action, from prosecuting the plaintiff pursuant to any and all charges unless a fully



open public trial is immediately guaranteed to the plaintiff.

D. Enjoining the defendants, their agents, servants, employees, attorneys and all persons in active concert and participation with them, from prohibiting the plaintiff's military counsel Captain Byron D. Baur, USAF and Captain Alessandro J. Ranciglio, USAF, from providing legal assistance to or appearing for the plaintiff in connection with collateral matters before the civil courts of the United States arising out of the criminal charges brought against the plaintiff.

E. Granting such other and further relief as this Court may deem appropriate.

Plaintiff requests a hearing on this motion.

/s/ Leonard B. Boudin
LEONARD B. BOUDIN
ERIC M. LIEBERMAN
RABINOWITZ, BOUDIN & STANDARD
30 East 42nd Street
New York, New York 10017

/s/ Joseph Forer
JOSEPH FORER
FORER AND REIN
430 National Press Building
Washington. D. C. 20004

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed October 3, 1973]

[Title Omitted in Printing]

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

LEONARD B. BOUDIN, being duly sworn, deposes and says:

1. I am chief counsel in the criminal proceedings entitled "United States v. Master Sergeant Raymond G. De Champlain," which is the subject of the pending action. I was requested by the accused and by his military defense counsel to represent Mr. De Champlain, because of my experience in similar litigation involving charges of violations of the espionage laws.

2. More specifically, I represented the defendant Coplon in *Coplon* v. *United States*, 185 F. 2d 629, *cert. den.*, 342 U. S. 920 and *Coplon* v. *United States*, 191 F. 2d 749 (D.C. Cir. 1951) *cert. den.*, 342 U. S. 926, as a result of my appointment in the first of those cases by Judge Sylvester J. Ryan of the United States District Court for the Southern District of New York. I represented Dr. Daniel Ellsberg in *United States* v. *Russo and Ellsberg*, No. 9373-WMB-CD, as a result of having been retained for that purpose by Dr. Ellsberg. I was chief counsel for Dr. Ellsberg from the time of his first indictment to the end of the case. The indictment charged violations of 18 U.S.C. 371, 641, 793(c), 793(d) and 793(e). A copy of the indictment is annexed hereto as Exhibit "A."

3. The *Ellsberg* case, as did the *Coplon* case, involved many so-called classified documents, some of which were classified and some of which had never been made public before the trial. In particular, the four so-called negotiation volumes in the *Ellsberg* case had never been published by The New York Times or any other newspaper. They were revealed for the first time when they were introduced by the Government at the trial.



4. In the *Coplon* case, all of the documents involved were made available to her defense counsel without any restrictions upon their right to examine them, to take notes with respect to them, or to use them in consultation with colleagues and associates. In the *Ellsberg* case, Judge Matthew Byrne, Jr., the presiding judge, granted the defense application for an order directing the Government to deliver a copy of the classified documents involved to defense counsel. A copy of the order is annexed hereto as Exhibit "B."

5. Judge Byrne imposed no restrictions upon defense counsel with respect to their making any notes which would facilitate their preparation for the trial. Indeed, he specifically recognized that the classified documents would have to be read and examined not only by the principal defense counsel but by their associates, by stenographers, clerks, typists, and legal consultants. Hence the order provided for the submission *in camera* to the judge of the names of persons to whom such copies were to be made available. This was done in several score of cases; indeed, there may have been a hundred persons who ultimately had access to one or more of the top secret and otherwise classified documents. The court was advised of the names of such persons as a step in securing their agreement not to release the information to persons not authorized by the court. The implementing procedure is reflected in Exhibit "C," from which I have excised the name of the individual consultant. In no case did the court pass upon the selection by defense counsel of persons to whom copies were to be sent. As a result, I and the other defense counsel made copies of the various top secret documents and transmitted by mail and otherwise such copies to associate attorneys, legal workers, expert consultants, and possible witnesses.

6. Many of the consultants used in the *Ellsberg* case were previously experts on the subject of classification procedures, national defense, public domain and the Indo-China war. Many more became expert as a result of their

work upon the case. As a consequence, since many of the problems are similar, I have retained for purposes of this case a number of the consultants used in the *Ellsberg* case; these include Professor Richard Falk of Princeton; William G. Florence, formerly leading security specialist in the Department of Defense; Professor Noam Chomsky of The Massachusetts Institute of Technology; and Professor Howard Zinn, of Boston University, who were both consultants and who testified as defense witnesses in the *Ellsberg* case; and the following scholarly researchers: Adam Bennion, Sam Hurst, presently a teaching assistant to Professor Zinn; and Paul Ryder.

7. It is necessary for defense counsel to obtain possession of such documents and to make them available to the consultants and potential witnesses for the defense if an effective defense is to be presented with respect to the charges against Sergeant De Champlain under 50 U.S.C. 783 (b) and 18 U.S.C. 793. 18 U.S.C. 793 involves such issues as whether the documents relate to the national defense; whether there was reason to believe that their disclosure could injure the United States in its national defense or be of advantage to a foreign nation with respect to the national defense of the United States; and whether the documents are in the public domain. Both 18 U.S.C. 793 and 50 U.S.C. 783 (b) also pose questions as to whether the documents were classified by persons authorized to classify them, whether they were otherwise lawfully classified, and whether they were classifiable, i.e., contained information whose disclosure would be prejudicial to the United States. These are issues well recognized by the judicial decisions and by the commentators. We refer this Court particularly to the most recent learned article on the subject by Harold Edgar and Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of National Defense Information*, 73 Columbia Law Review, 929 (1973). The issues which we have indicated above are specifically those which were referred to by Judge Byrne in his tentative statement to counsel of the issues made in the course of the *Ellsberg* case. A copy is attached as Exhibit "D." As is well known, Judge Byrne did not have



occasion to instruct the jury on these issues by reason of the dismissal of the indictment for governmental disconduct.

8. It is apparent that without the customary access of counsel and the right of counsel to prepare witnesses and to discuss the contents of these documents with defense consultants, it is impossible to raise these and related defenses. The restrictions imposed by the defendants in this case are unworkable. The Government's suggestion in the *Ellsberg* case that Government security procedures might be applicable to defense counsel and their consultants was quickly disposed of by Judge Byrne in his oral rulings which led to the order attached hereto as Exhibit "B."

/s/ Leonard B. Boudin
LEONARD B. BOUDIN

Subscribed and sworn to before me
this second day of October, 1973.

/s/ Herbert Jordan
Notary Public

HERBERT JORDAN

Notary Public, State of New York
No. 31-4506463 Qual. in N. Y. County
Commission Expires March 30, 1975

EXHIBIT B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 9373-WMB-CD

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG, DEFENDANTS

[Filed April 27, 1972]

## PROTECTIVE ORDER

This matter comes before the Court upon motion of plaintiff, United States of America, for a protective order to prevent the disclosure or dissemination of documents or any portions thereof on the ground that they, or parts thereof, are under a Government security classification pursuant to Executive Order 10501. The documents in question are the following:

(1) Volumes of a Department of Defense study entitled "United States—Vietnam Relations, 1945-1967":

| Volume | Title |
|---|---|
| IV.B.5. | EVOLUTION OF THE WAR, THE OVERTHROW OF NGO DINH DIEM, MAY-NOVEMBER 1963. |
| IV.C.4. | EVOLUTION OF THE WAR, MARINE UNITS GO TO DA NANG—MARCH 1965. |
| IV.C.5. | PHASE I IN THE BUILD-UP OF U.S. FORCE — THE DEBATE — MARCH-JULY 1965. |
| IV.C.9(a). | EVOLUTION OF THE WAR, US/GVN RELATIONS: 1963-1967. |



| Volume | Title |
|---|---|
| IV.C.9(b). | EVOLUTION OF THE WAR, US/GVN RELATIONS: 1963-1967. |
| VI.C.1. | SETTLEMENT OF THE CONFLICT—HISTORY OF CONTACTS NEGOTIATIONS, 1965-1966. |
| VI.C.2. | VI. SETTLEMENT OF THE CONFLICT C. HISTORIES OF CONTACTS MARIGOLD. |
| VI.C.3. | VI. SETTLEMENT OF THE CONFLICT C. HISTORIES OF CONTACTS SUNFLOWER. |
| VI.C.4. | SETTLEMENT OF THE CONFLICT NEGOTIATIONS, 1967-1968—HISTORY OF CONTACTS: |

(2) Pages 1, 2, 3, 4, 9, 12, 13 and 14 of a memorandum dated 27 February 1968, entitled "REPORT OF CHAIRMAN, JCS ON SITUATION IN VIETNAM AND MACV FORCE REQUIREMENTS";

(3) Part II of a memorandum entitled "NEGOTIATION AND VIETNAM: A CASE STUDY OF THE 1954 GENEVA CONFERENCE".

The Court having considered the matter, pursuant to Rule 16(e), Federal Rules of Criminal Procedure and the inherent power of the Court;

IT IS HEREBY ORDERED THAT:

(1) Other than as provided in Executive Order 10501 and regulations thereunder, there shall be no disclosure or dissemination of the documents or information contained therein except as provided in this order.

(2) There shall be no public disclosure by either the Government, the defendants, or other individual of any of the above listed documents (hereinafter referred to as "documents") or the information contained therein.

(3) The Government shall furnish to counsel of record for each of the defendants one set of the documents for their use in preparation for and during trial.

(4) Counsel of record for either the Government or the defendants (hereinafter referred to as "counsel")

may permit the documents to be reviewed and inspected by the defendants or any investigators, experts, consultants, or witnesses whom counsel believes are necessary and essential for the preparation and presentation of the case. When counsel desires to permit anyone, other than the defendants, to review or inspect the documents, counsel, prior to said review or inspection, shall provide the Court, in camera, with the names of such persons.

(5) Where counsel believes it is necessary and essential to the preparation and presentation of the case to provide an investigator, consultant, expert, or witness with a copy of the documents or parts thereof, counsel may petition the Court ex parte for permission to make and transmit said copy.

(6) Prior to any person reviewing, inspecting, or receiving the documents or any portions thereof, it shall be the duty of counsel furnishing the documents to serve said person with a copy of this order, and receive from said person a written agreement to comply with the terms of this order. Such written agreements are to be filed in camera with the Court.

(7) No person permitted to inspect or possess a copy of said documents by order of this Court shall copy or reproduce any part of said document or their contents any manner except as provided herein.

(8) When any person receiving documents, or copies of documents or portions thereof, no longer requires that material for the preparation and presentation of the case, those items will be returned to the counsel who furnished the said material. Counsel will hold all such material subject to the provisions of this order until such time as the Court shall otherwise order disposition of such material.

DATED April 25, 1972.

/s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge



EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 9373-WMB-CD

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG,
DEFENDANTS

NOTICE OF IN CAMERA FILING

Defendants, by and through their undersigned counsel, hereby give notice of an *in camera* submission of Agreement to Abide by Terms of Protective Order and Acknowledgement of Receipt of Document Covered by Protective Order.

Respectfully submitted,

LEONARD B. BOUDIN
CHARLES R. NESSON
CHARLES E. GOODELL
DOLORES A. DONOVAN

By _____
Attorneys for Defendant
Daniel Ellsberg

LEONARD I. WEINGLASS
H. PETER YOUNG

By _____
Attorneys for Defendant
Anthony Joseph Russo, Jr.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 9373-WMB-CD

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG,
DEFENDANTS

## SUBMISSION OF AGREEMENT TO ABIDE BY PROTECTIVE ORDER AND ACKNOWLEDGEMENT OF RECEIPT OF DOCUMENT COVERED BY PROTECTIVE ORDER

Defendants hereby submit agreement to abide by protective order and acknowledgement of receipt of document covered by protective order for the following person:

Respectfully submitted,

LEONARD B. BOUDIN
CHARLES R. NESSON
CHARLES E. GOODELL
DOLORES A. DONOVAN

By _____
Attorneys for Defendant
Daniel Ellsberg

LEONARD I. WEINGLASS
H. PETER YOUNG

By _____
Attorneys for Defendant
Anthony Joseph Russo, Jr.



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 9373-WMB-CD

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG,
DEFENDANTS

## ACKNOWLEDGEMENT OF RECEIPT OF DOCUMENT COVERED BY PROTECTIVE ORDER

I hereby acknowledge receipt on this date of classified documents specified in the indictment #9373-WMB-CD *U.S.* v. *Anthony Russo & Daniel Ellsberg* as listed below:

Government's Transparency pages relating to intelligence.

Date March 10, 1973

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 9373-WMB-CD

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG,
DEFENDANTS

## AGREEMENT TO ABIDE BY TERMS OF PROTECTIVE ORDER

I have received this date a copy of the Protective Order issued by Judge William Matthew Byrne, Jr. on April 27, 1972, covering the classified portions of the Pentagon Papers. As a condition to my receiving those papers, or portions thereof, I affirm that I have read and understand the protective order and will abide by its terms.

Date March 10, 1973



EXHIBIT D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 9373-WMB-CD

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG,
DEFENDANTS

## TRANSCRIPT OF PROCEEDINGS

THE COURT: Gentlemen, as I have stated to you before, the issues in this case are obviously to be framed by the evidence. And I talked of 793, and during our discussions of 793(d) and (e), which is now for the most part 793(e).

I am going to discuss briefly some of the issues as I see them, in that one section. These are some of the issues that the evidence may well be tested against under 793.

There may well be other issues that come up during the course of the trial by introduction of evidence.

As a matter of fact I assume that there will, and some of those matters that I say are issues now may in fact not become issues because of the evidence as it is introduced.

The statement of issues is not in any way to be intended to be a final determination of the issues raised by the charges in this case. I think I have made that clear to all counsel on several occasions. That obviously is because I haven't heard the evidence in the case.

As I mentioned a few moments ago, the only idea that I have of the evidence in the case is by way of arguments or the very brief statement that the Government made in their trial memorandum.

Therefore, the final determination of the law and the issues under 793 will be made at the time of the jury

instructions, at which time you will have an opportunity to be heard.

I do recognize, however, that in presenting the evidence, both on the Government's side and the defendants' side, it might be of assistance to you if you had my thoughts on what I feel some of the issues are.

So, therefore, I give you some of these tentative thoughts, contingent, of course, on what the evidence ultimately demonstrates that the issues in the case are.

I want to make it clear that this tentative statement of issues is not to be taken as a limitation by the Government or any limitation by the defendants of what you may attempt to prove or disprove at this trial.

You are to proceed with your case, as you feel it should litigated. I will deal, as in the normal case, with the offers of evidence at the time that they are made.

I am not by this statement attempting in any way to limit what you feel the issues in the case are. I don't want anybody later saying, "Well, you told us the issues were this" or "the issues were that, and we didn't put evidence on," or "we relied upon that statement in the presentation of our case."

Is that understood by the Government?

MR. NISSEN: Yes, your Honor.

THE COURT: By the defense?

MR. NESSON: Yes, your Honor.

MR. WEINGLASS: Yes, your Honor.

THE COURT: In stating what I feel the tentative issues are, I have kept in mind what I feel is the congressional purpose behind this statute. And that is to protect information and documents that belong to the Government, which have been kept confidential by the Government, in prevention of injury to the nation.

In 793 I find the following major issues:

1. Was the possessor in unauthorized possession at the time of the offense?

Some subissues to that are:

Were the documents such that authorization was required to possess them?

Another subissue is: Did the defendant have such authorization at the time of the offense?



And another subissue would be: Even if his possession was originally authorized, had it at some point become unauthorized—not unauthorized in use, but unauthorized in possession.

Moving then to the next issue, did the documents relate to the national defense at the time of the offense?

A subissue is: Was the subject matter of the documents within the Gorin definition of "relates to the national defense"?

And I do not, by that, say that I intend to be fully limited to the Gorin definition, because I feel that there are other matters that must be considered in determining whether a document relates to the national defense in this statute, within this section of that statute.

Subissue b: Were the documents owned by the government, and had the government taken measures to keep the information in the documents confidential—that is, not publicly available?

Another subissue would be: Do the documents and the information contained therein relate to the current national defense—that is, the national defense as of the time of the alleged offense, and is there a relation to the current national defense in a way that is direct and reasonable, rather than strained and arbitrary?

Another subissue, which is not in Gorin—however, they are analyzed and discussed by the court in Gorin.

Are the documents the type that require protection in the interest of the national defense, in that their disclosure could adversely affect or injure this nation or be to the advantage of any foreign nation?

That would be as to the nature of the document.

Another subissue would be: Were the documents, in fact, confidential and the type that their disclosure could reveal information that was not at that time publicly available?

Moving then to an issue of: Who was the person not entitled to receive it? This issue, more than any of the others, will depend greatly upon the facts of which I am, as I said before, not aware.

The subissues under this would be: Did the government own these documents, and had the government, as

owner, restricted the transmission of the documents in any way?

If the dissemination of the documents was restricted, how was it done? Was it done by specific instructions or by general rule or regulation?

If the dissemination was restricted by specific instructions, did the person issuing these instructions have the authority to do so? Did the instructions designate the persons entitled to receive the documents? Did it require that anyone receiving the documents obtain permission in advance? Was the recipient entitled to receive the documents under the instructions, or was he precluded from access by the instructions?

If the dissemination of the documents was restricted by rule or regulation, and the determination of a person not entitled to receive is to be made by rule or regulation, the issues involved here would then be—some of them would be as follows:

If the rule or regulation is the classification system, were the documents lawfully classified under Executive Order 10501? Were they classified by someone with authority to classify? Were the documents, in fact, classifiable—that is, at a minimum, did they contain information or material, the unauthorized disclosure of which could be prejudicial to the defense interests of the United States?

The question, then, as to the classifying of the documents, would be—one issue would be as to whether the person who classified them had authority to classify them, and, secondly, whether the documents were, in fact, classifiable, in order to bring them within the Executive Order 10501?

Continuing on, if the nonentitlement is to be shown by way of a rule or regulation, it would have to also be shown—the issue would have to be: Was the recipient among those who was excluded from the possession by the Executive Order and the rules and regulations of government agencies promulgated under the Executive Order?



Did the recipient have official duties which required such documents in the interest of promoting the national defense?

Had the recipient been determined to be trustworthy to receive such documents by an official of the Executive Branch with authority to make those determinations?

Turning to the issue—there also obviously, as I say, depending on the facts—there is just a general broad issue in the "not entitlement" in Coplon, and all the other cases, where the judge just told the jury that obviously they are not entitled to it, and I don't think that applies as I know the facts here, but:

Were there any facts such that it would be obvious that the recipient should not receive such documents?

Turning to the question of the willful transmission of the documents to a person not entitled to receive them. This statute requires more than a knowing transmission of the documents; it requires knowledge, and, in effect, scienter.

MR. BOUDIN: Could I just interrupt your Honor? Will your Honor oblige us by moving a little more slowly? We are going to get the minutes, and I can follow your Honor, but a little slower, if you will. I am not asking your Honor to go back.

THE COURT: Yes. As to the question of willfulness, there are three major subissues:

Did the defendant at the time of the transmission, delivery or communication, know that the recipient was not entitled to receive the documents?

The issue will be: Did the defendant make a knowing transmittal of the documents to a person not entitled to receive them?

In other words, the issue would be: Did the defendant know for any reason that the recipient should not receive the documents or that someone's permission was required before the recipient could have access to the documents?

At the same time, the transmitter, at the time of the offense—the issue will be: Did he know or have reason to believe that the documents related to the national de-

fense, as I described them above? And that would include the elements of Gorin and all of the other elements that I stated above, including the adverse effect on this nation, and to the advantage of a foreign nation.

Did he know or have reason to believe that the documents related to the national defense, or that in the interests of the national defense they were to be kept confidential?

That would be a willful, knowing communication of a document, knowing or having reason to believe that it relates to the national defense, knowingly communicated or transmitting it to a person the transmitter knows is not entitled to receive it.

Those are the general issues, as I see them, in 793.

In 793(c), I am not going to go through them by issue.

There was one matter that was left, and that was whether—I don't have the section. I guess it was for purpose aforesaid, whether that includes "and with like intent." I am of the opinion that it does not include "with like intent." The intent required for (c) is picked up through (d) and (e).

I hope that it is not necessary to again state that I am giving you these issues, to both sides, to generally consider in the introduction of your evidence, and I do not intend to give much credence to someone who raises the fact that I raised these issues before trial.

I am doing it in a manner just so you may have those thoughts before you in consideration of the presentation of your evidence.



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed October 3, 1973]

[Title Omitted in Printing]

AFFIDAVIT

Now comes Byron D. Baur, being first duly sworn, deposes and says:

I am a duly licensed attorney and counselor at law, and I am a member of the Bars of the Supreme Court of the Commonwealth of Pennsylvania and of the United States Federal District Court for the Western District of Pennsylvania. I am also a duly certified judge advocate in the United States Air Force, and I am the chief military defense counsel designated by the Air Force to represent Master Sergeant Raymond G. DeChamplain in his rehearing by General Court-Martial. I have been engaged in representation of Master Sergeant DeChamplain since sometime in April 1973, and since that time have been in charge of all other military defense counsel working on the DeChamplain case. I have been his chief military spokesman at both pretrial sessions held thus far in the case under Article 39(a), Uniform Code of Military Justice, 10 U.S.C. Sec. 839(a).

In anticipation of the apparent necessity for Master Sergeant DeChamplain to seek relief from appropriate federal courts as to certain aspects of the Air Force's handling of his case, I have endeavored on two occasions to receive official permission to represent Master Sergeant DeChamplain, or to have another judge advocate defense counsel represent Master Sergeant DeChamplain, in whatever federal court action might become necessary. On 7 May 1973, I joined as co-signer with Captain James R. Crassweller, another judge advocate defense counsel, in writing to our military superior in the Office of The Judge Advocate General, United States Air Force, requesting such permission. That letter was

couched in terms of requesting such permission to represent all of our clients in such non-court-martial judicial proceedings, where the proceedings would directly relate to military charges pending against our clients or other government actions affecting our clients' rights, such as the imposition of pretrial confinement without legal justification. I never received a reply to that request, but Captain Crassweller did receive a reply, dated 21 May 1973, denying him such right to go into federal civil court. The letter stated generally that "judge advocates may not participate in proceedings in civil courts, even where the proceedings are collateral to a court-martial in which the judge advocate is a defense counsel for an accused who is a party to the civil action."

Subsequently on 23 July 1973, I wrote directly to The Judge Advocate General, United States Air Force, requesting specific permission to represent Master Sergeant DeChamplain in civilian court actions related to defending the pending court-martial charges against him. My request was made for myself and for Captain Alessandro J. Ranciglio, the assistant military defense counsel, who was and is, incidentally, admitted to practice before the Federal District Court for the Western District of Missouri, which is the very court in which a federal court action in behalf of Master Sergeant DeChamplain, contesting the legality of his pretrial confinement, would normally be brought. By letter dated 31 July 1973, Brigidier General Harold R. Vague, The Assistant Judge Advocate General, United States Air Force, denied Captain Ranciglio and me the right to represent plaintiff in federal civil court. The position of The Judge Advocate General's office, as derived from their letters of 21 May 1973 and 31 July 1973, is that 50 U.S.C. Sec. 205 forbids an officer or employee of the federal government from representing parties in actions in which the United States is a party, except where required in the discharge of his official duties; that the discharge of a judge advocate's official duties (for some reason) does not encompass representing his client in any proceedings other than a court-martial; that Air Force Regulation 110-3, paragraph 2, as interpreted by their office, implements 50 U.S.C. Sec. 205 in such a way as to positively forbid a judge advocate from representing his military accused/client in civilian courts. The Office of The Judge Advocate General, United States Air Force, constitutes my military superior in carrying out all of my military duties. At present I would possibly be in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. Sec. 892, as well as risking the disapprobation of my superiors, if I were to violate these restrictions which they have placed on me. Within the United States Air Force, the Office of The Judge Advocate General is the "office of primary responsibility" for the promulgation and interpretation of Air Force Regulation 110-3. Therefore, having asked that office's opinion and having received it on two occasions, I have exhausted the appropriate channels in seeking to aid my client by representing him in federal court.



The United States Court of Military Appeals has indicated that it lacks jurisdiction to determine the propriety of such regulatory restrictions placed on the practice of a judge advocate defense counsel in civilian courts. *Johnson* v. *The Judge Advocate General of the United States Army*, 45 CMR 294 (1972).

It is my professional opinion that at this stage in the court-martial proceedings, federal court proceedings by way of habeus corpus or other petition for extraordinary relief are appropriate and necessary to protect my client's constitutional rights. Military authorities and the military court have provided no relief from the denial of substantial constitutional rights which I believe are due my client, involving such issues as the unconstitutionality of Article 134, Uniform Code of Military Justice, 10 U.S.C. Sec. 934; my client's right to a public trial which they intend to deny him; the legality of his pretrial confinement, for which there has not been any judicial review obtainable within military judicial channels; and my client's right to the effective assistance of a civilian counsel of his choice, who is being severely hampered by military restrictions on access to relevant "classified" information.

Concerning the causes of action stated in plaintiff's Complaint for Declaratory Judgment and Injunctive Relief, the matters raised in the first three causes of action have all been raised before the military judge of the General Court-Martial hearing Master Sergeant DeChamplain's case, who is Colonel Russell A. Stanley. All of these matters have been decided adversely to the plaintiff. Specifically, the unconstitutionality of Article 134, Uniform Code of Military Justice, 10 U.S.C. Sec. 934, was made the subject of a motion to dismiss and was extensively briefed and argued to the military judge in a hearing held from 4 to 8 September 1973, and that motion was denied by the military judge. Likewise, several motions requesting access to all relevant information in the case for individual civilian defense counsel Mr. Leonard B. Boudin, and his associates, including technical consultants and experts, have been made in hearings held 16-20 July 1973 and 4-8 September 1973. Likewise, numerous requests, by letter and verbally, have been made to Air Force officials responsible for prosecuting and processing the DeChamplain case. All such efforts have been unsuccessful, except to the extent indicated in the instant Complaint. A motion for a "public trial" of all charges against the plaintiff was made by me and supported by extensive argument and citation of legal authorities during the hearing 16-20 July 1973. This motion likewise was denied by the military judge, who indicated that the court would be closed to all persons not possessing the appropriate security clearances or "need to know," whenever classified documents or information were being introduced or discussed.

Concerning the second cause of action, the denial of access to the entire record of the prior court-martial trial and the "classified" documents upon which the current charges on rehearing are based, it is my opinion, after having personally reviewed all of these documents, that a full and adequate understanding of the case and the possible theories of defense will not be available to civilian counsel, Mr. Leonard B. Boudin, and his associates, technical consultants, expert witnesses, etc., until they have had full and adequate opportunity to review,



discuss, and analyze all of these various documents and their implications to the case. Although Captain Ranciglio and I have had limited access to these documents and are knowledgeable of their contents, we have been forbidden by law and regulation to disclose their contents to Mr. Boudin or his referenced associates, and we have not done so and will not do so without official approval. However, after having discussed the defense of this case with Mr. Boudin and certain of his associates in general terms and without specific reference to those documents, it is my professional opinion that several potentially fruitful opportunities for presenting a vigorous defense exist, which can never be adequately understood or developed by civilian counsel unless and until he and his associates have extensive access to the documents involved. It is further my specific opinion that the technical consultants/experts listed thus far by the defense, and perhaps others, as necessary, will need to see and work extensively with the documents in question in order to adequately develop several potentially valid defenses, such as the legality of the classification process involved, the propriety of classification of certain of these documents, "public domain" of certain of the matters contained in the documents, etc. If I were the only defense counsel in this case, I would still desire to utilize these experts, or others with similar knowledge and training, in the defense of this case. These averments of mine go equally to the approximately fifteen documents which are being "withdrawn" by the government as they do to the approximately nine documents which the government has indicated it will provide Mr. Boudin limited access to.

With regard to the denial of access to Mr. Boudin, his associates and consultants, the military judge's rulings thus far have consistently upheld the prosecution's position that access will only be granted to the limited number of the "classified" documents which the prosecution concedes are relevant and which will be offered in evidence by the prosecution. The military judge's rulings have also been to the effect that only Mr. Boudin, one of his law partners, and one of his clerk/typists can

have such access, and only at the times and places and under the several restrictions specified by the government, as stated in the Complaint. As of the date of this Affidavit, additional defense and prosecution motions on certain "access" questions were still pending before the military judge, his rulings on which could somewhat modify the extent of Mr. Boudin's access. However, in view of the military judge's rulings thus far, I am not of the opinion that the full and unrestricted access demanded in the Complaint will be granted on the basis of these or any further motions.

With regard to plaintiff's probable confinement status in the event that he is convicted by the court-martial and sentenced, inter alia, to some period of confinement at hard labor, I am of the opinion that he will be held in confinement for the many months, or even years, before the military appellate courts have completed their review of the case. Although deferment of service of sentences to confinement are permitted under paragraph 88f, Manual for Courts-Martial, 1969 (Rev.), the decision to defer such confinement is entirely discretionary with the Convening Authority, and that official has consistently exercised his very similar discretion in favor of keeping the plaintiff in pretrial confinement.

/s/ Byron D. Baur
BYRON D. BAUR,
Captain, USAF
Defense Counsel

SUBSCRIBED AND SWORN TO BEFORE ME, this 28 day of September, 1973.

/s/ James R. Crassweller
JAMES R. CRASSWELLER,
Captain, USAF
Judge Advocate

Notarial Authority: 10 U.S.C. Sec. 936.



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed October 25, 1973]

[Title Omitted in Printing]

MOTION TO DISMISS

Defendants, by their attorney, the United States Attorney for the District of Columbia, respectfully move the Court to dismiss this action for failure of the complaint to state a claim upon which relief can be granted or over which this Court has subject-matter jurisdiction. Rule 12(b) (1, 6), F.R.Civ.P.

Attached hereto are a memorandum of points and authorities and a proposed Order.

/s/ Harold H. Titus, Jr.
HAROLD H. TITUS, JR.
United States Attorney

/s/ Arnold T. Aikens
ARNOLD T. AIKENS
Assistant United States Attorney

/s/ Michael A. Katz
MICHAEL A. KATZ
Assistant United States Attorney

EXHIBIT C

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS UNITED STATES AIR FORCE
USAF Trial Judiciary, Fourth Circuit
Lowry Air Force Base, Colorado
80230

UNITED STATES

*v.*

MASTER SERGEANT RAYMOND G. DECHAMPLAIN
FR 043-24-7022, 1840th Air Base Wing
Richards-Gebaur Air Force Base, Missouri

COURT ORDER NUMBER 1

This order pertains to Government Motion for Restricting Issues (Appellant Exhibit CXXVII).

It is hereby ordered and held as follows:

a. That in order to prove the element under Section 783(b) of Title 50 that a document is classified as affecting the Security of the United States, it is necessary only to prove that a document or the information of the document was classified and that a person with authority to classify had designated the classification.

b. That any evidence concerning the security classification system is to be limited to whether an individual who designated a classification had classification power. It would not be proper for either the Government or the Defense to call expert witnesses in the security classification area on the issue of whether a particular document should have received the security classification stamped on it.

c. That it is not necessary under the 18 USC 793 violations for the prosecution to prove that a particular document and/or information contained therein in fact, adversely affect or injure this nation or be of advantage



to a foreign nation. Further, in view of this holding, this Court will not allow expert witnesses for either the Government or the Defense to testify whether documents and/or information could, in fact, adversely affect or injure this nation or be of advantage to a foreign nation.

d. In proving the propriety of any security classification, the prosecution may rely on the presumption that a document with a security classification stamp on it, which has been treated as a classified document in official channels, is presumed to have been classified by an official with the appropriate authority.

This 13th day of October 1973.

/s/ Russell A. Stanley
RUSSELL A. STANLEY,
Colonel, USAF
Military Judge

EXHIBIT D

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS UNITED STATES AIR FORCE
USAF Trial Judiciary, Fourth Circuit
Lowry Air Force Base, Colorado

UNITED STATES

*v.*

MASTER SERGEANT RAYMOND G. DECHAMPLAIN
FR 043-24-7022, 1840th Air Base Wing
Richards-Gebaur Air Force Base, Missouri

COURT ORDER NUMBER 5

This order pertains to those pending matters to be decided concerning Defense Motion for Appropriate Relief (Disclosure of Entire Record of Former Trial and Other Matters Material to Case) (Appellate Exhibit XCIV), and Government Motion to Restrict Access to Civilian Defense Counsel Team to Classified Material.

The Government motion to restrict access of civilian defense counsel team to classified material is granted in its entirety. The civilian defense counsel team consisting of Mr. Boudin, Mr. Krinski, and Mr. Charles will be granted access to the classified materials listed in Attachment 1 (Appellate Exhibit CXXXVIII) to said Government motion, as well as Article 32 testimony and former trial testimony relating thereto, subject to the conditions listed therein as well as those conditions set forth in Memorandum of Understanding (Attachment 2) to said Government motion.

The relief sought in paragraphs a, b, and c of Defense Motion for Appropriate Relief (Disclosure of Entire Record of Former Trial and Other Matters Material to Case) (Appellate Exhibit XCIV) which asks for documents or testimony beyond the scope of such restricted access is denied.



The relief sought by defense in their Motion for Appropriate Relief (Disclosure to Entire Record of Former Trial and Other Matters Material to Case) (Appellate Exhibit XCIV) in paragraphs g, h, i, j, k, and the last two paragraphs of said motion is denied.

This 13 day of October 1973.

/s/ Russell A. Stanley
RUSSELL A. STANLEY,
Colonel, USAF
Military Judge

EXHIBIT E

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS UNITED STATES AIR FORCE
USAF Trial Judiciary, Fourth Circuit
Lowry Air Force Base, Colorado

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UNITED STATES

*v.*

Master Sergeant
RAYMOND G. DECHAMPLAIN
FR 043-24-7022
1840th Air Base Wing
Richards-Gebaur Air Force Base, Missouri

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TRANSCRIPT OF PROCEEDINGS

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Abbreviations

TC—Trial counsel (prosecutor)
DC—Defense counsel
ADC—Assistant defense counsel
MJ—Military Judge

TC: The government's position, Your Honor, is that, first of all, the classification and the classified documents is not essential to the guilt or innocence of the accused. In other words, the classified information that we are concerned with here does not go to whether or not the accused is guilty. All that is necessary is that we show that the documents are classified and, of course,



classified means relating to the national security—national defense—and that it was classified purposely and properly. The actual content of those messages does not go to the guilt or innocence of the accused. Under Title 18, of course, if a document was classified or had a classification on it—confidential, secret, top secret—then the accused would be presumed to know that could be used to the injury of the United States; and under Title 50 again the classification itself serves to show that it relates to the national defense because that, of course, is what the classification means.

The defense hasn't cited any cases directly in point; and this has to be a balancing, of course, between the accused's right to a public trial and the right of the United States to protect its secret documents from the eyes of the public and from the eyes of anyone who might use those documents to the detriment of the United States. So cases that involve mere confidential materials aren't really what we are talking about; we're talking about documents that are marked "top secret", documents that are marked with classification that mean that they relate to the national defense.

So to sum it up, the defense counsel does not cite cases directly in point concerning what we are doing here. Of course, as far as precedent goes there have been many, many cases that have had closed proceedings concerning a classified portion of the case; and, of course, the trial will be public as concerns those matters that are not classified and that will be the major portion of the trial. There will only be small portions of the trial that will be classified and will not be open to the general public. Of course, the defense makes a good point that a trial should be public and should be open, but this necessity has to be weighed against the interests of national defense that I mentioned. Thank you.

ADC: Rebuttal, Your Honor.

MJ: Yes.

ADC: First of all, Your Honor, I would hasten to disagree with one comment of trial counsel. I don't believe the government has the right to assume any ele-

ment of any offense against the accused; and since the accused stands charged with unlawful possession of classified documents, evidence we anticipate the government will attempt to produce will be to show that the documents possessed had bearing on the national interest. I fail to see where just the word "confidential", "secret" or "top secret" in and of itself would satisfy that requirement—that element of the offenses charged. You have to get into the nature or the contents of these documents. I will readily agree with trial counsel that history is full of cases of closed hearing. I would say principal among these is Spanish Inquisition and the English Star Chamber. That does not mean that these closed proceedings are proper. We reiterate that the contents of the documents included in the charges which stand against our client are part and parcel of the nature of the offense charged.

MJ: The Manual for Courts-Martial gives the military judge discretion to determine if the trial should be closed, and specifically lists as one of the reasons he can close it the hearing of classified information, and I'll make that determination when the time comes. But in answer to your question though so you can anticipate, if I do determine it is classified information, then I will close the court to the public. So in that sense your motion is denied.

DC: Is that for all levels of classification, sir?

MJ: Well, if it arises it will be closed to any persons not authorized access to those particular documents and/or testimony no matter what the classification.

DC: But you're saying that as long as some agent of the government has decided to label a particular document "Classified", you are going to accept that and close trial?

MJ: I didn't say that. I'll make a judgment when it comes up.

DC: I see. All right.

MJ: I didn't say just because he labeled it such I would close it. I said I will do what the Manual says I have the power to do. After considering all the facts, anticipated testimony and documents—after examining



the documents and the type of testimony that will come before me—I will make that decision at that time. But I don't mean to play games with you—in the sense that you are asking for a complete and open public trial as set forth in this Appellate Exhibit XIII, your motion is denied.

DC: In that regard, sir, I'll renew my motion with regard to allowing us full use of the Charge Sheets—that one item. You said you would review documents item for item. We specifically address your attention to the Charge Sheet which has been classified Confidential and which the government by its own admission believes contains only one general topic that might justify any such classification, and that is the hiding of the names of several Thai witnesses. Now, I suggest to you, sir, that while often the government chooses to hide the names of confidential informants in cases, it does not have the power to classify such a matter as confidential, secret, or top secret in the defense of the United States national defense simply to keep such Thai agents, who happen to be employed two years ago in this kind of work, confidential.

## EXHIBIT F

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force
Washington DC 20330

AF REGULATION 110-24
29 June 1973

Judge Advocate General Activities

# LITIGATION, TAX DISPUTES, ADMINISTRATIVE PROCEEDINGS, AND LEGAL PROCESS

This regulation directs what action Air Force personnel take in connection with litigation, tax disputes, commencement of legal or administrative proceedings, and service of legal process involving the Air Force, Air Force personnel in the performance of official duty, or Air Force instrumentalities (including nonappropriated fund activities) in the United States and foreign countries. It applies to all USAF activities, including the Air Reserve Forces and the Air National Guard.


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Supercedes AFR 110-3.5 October 1967. (For summary of revised, deleted, or added material, see signature page.)

OPR: JACL

DISTRIBUTION: S

## SECTION A—GENERAL PROVISIONS

1. Functions of The Judge Advocate General. The Judge Advocate General of the Air Force initiates, supervises, and coordinates all actions necessary to protect the interests of the United States in all legal and administrative proceedings, tax disputes, and legal matters which arise out of or otherwise affect Air Force activities in the United States and in foreign countries. The Judge Advocate General of the Air Force:

a. Maintains close liaison with the Department of Justice and assists in procuring evidence supporting the position of the Government, in preparing pleadings and briefs, in compiling the evidence and evaluating it, and in preparing trial and appellate presentations.

b. Makes Air Force recommendations on the initiation of legal actions and appeals and on the acceptability of proposed compromises or settlements of pending litigation or controversies.

c. Maintains close liaison with other Department of Defense agencies and the General Accounting Office and cooperates in procuring evidence supporting the position of the Government.

d. Negotiates and corresponds with and presents evidence, pleadings, and briefs to Federal, State, and municipal regulatory bodies in administrative and quasi-judicial proceedings.

Except as otherwise provided by this regulation, all actions pertaining to the aforementioned responsibilities are taken only by The Judge Advocate General of the Air Force and those specifically authorized by him to act on his behalf, and commands subordinate to HQ USAF will not initiate or otherwise take any action pertaining to these responsibilities unless specifically authorized by The Judge Advocate General of the Air Force.

2. Air Force Personnel and Employees as Counsel. No person on active duty with the Air Force or employed by the Air Force will appear as attorney or counsel for the Air Force before any civil court, tribunal, administrative body, or Government agency in the United States or in a foreign country unless specifically authorized by The Judge Advocate General of the Air Force. Under no circumstances will any person on active duty or employed by the Air Force appear as attorney or counsel for the Air Force before any civil court, tribunal, administrative body, or Government agency in the United States or in a foreign country in behalf of individuals in matters not connected with the performance of official Air Force duties.



3. Report of Legal Activities, RCS: HAF-JAC (AR) 7301. Reports will be prepared and submitted in accordance with the instructions contained in sections B and C of this regulation.

4. Persons Responsible for Reporting. In all cases, the staff judge advocate of the installation or unit concerned is responsible for complying with the reporting requirements specified in sections B and C of this regulation. If there is no staff judge advocate assigned to the installation or unit, then:

a. On all matters except those pertaining to contracts, subcontracts, and purchase orders, the commander of the installation or unit concerned will be responsible for complying with the reporting requirements.

b. On all matters pertaining to contracts, subcontracts, and purchase orders, the appropriate plant representative or contracting officer is responsible for complying with the reporting requirements.

5. Documentation. Disposition of documentation prescribed by this regulation will be according to AFM 12-50.

## SECTION B—LEGAL AND ADMINISTRATIVE PROCEEDINGS, TAX DISPUTES, AND LEGAL MATTERS ARISING WITHIN THE UNITED STATES, ITS TERRITORIES, OR ITS POSSESSIONS

6. Lawsuits Filed Against the United States in Federal Courts. By statute, service of summons and complaints

in lawsuits filed in US Federal courts against the United States, including suits under the Federal Tort Claims Act, is made on the United States Attorney and/or the Attorney General. He then requests an investigative report from HQ USAF. HQ USAF, in turn, makes a direct request on subordinate commands for reports and issues instructions as to their distribution.



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed November 8, 1973]

[Title Omitted in Printing]

PLAINTIFF'S NOTICE OF AMENDMENT TO MOTION FOR PRELIMINARY INJUNCTION

PLEASE TAKE NOTICE that upon the papers previously filed in support of plaintiff's motion for preliminary injunction, and upon the affidavits of Captain Byron D. Baur and Leonard B. Boudin, Esq., attached hereto, the plaintiff, upon the hearing for the motion for preliminary injunction, will seek a preliminary injunction granting the following additional relief:

1. Enjoining the defendants, their agents, servants, employees, attorneys, and all persons in active concert and participation with them, pending the final hearing and determination of this action, from intercepting, divulging, recording or using the telephonic, postal and other communications (written and oral) of the plaintiff herein, and of his attorneys and their associates and consultants, in the pending court-martial proceedings against the plaintiff herein, except as expressly authorized by order of a court of the United States pursuant to statute.

2. Directing the defendants to disclose to this Court all logs, recording, memoranda, applications for judicial orders and judicial orders, authorizing any government agency's or agent's interception, recording, examination or divulging of such telephonic, postal or other communications, oral or in writing, of the plaintiff's counsel and their associates and consultants and of the plaintiff himself.

3. Directing the defendants herein to disclose to the Court and ultimately, subject to the approval of the Court, to the plaintiff's counsel herein, the existence, past or present, of such interceptions, recordings, memoranda,

examinations and divulging of telephonic, oral and written communications on the part of the plaintiff at any time in the past, and of any of his counsel from the first dates of their representation of the said plaintiff.

LEONARD B. BOUDIN
ERIC M. LIEBERMAN
RABINOWITZ, BOUDIN & STANDARD
230 East 42nd Street
New York, N.Y. 10017

FORER AND REIN
430 National Press Building
Washington, D.C. 20004

Attorneys for Plaintiff



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed November 15, 1973]

[Title Omitted in Printing]

## NOTICE OF APPEAL

Notice is hereby given this 15th day of November, 1973, that defendants hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 13th day of November, 1973 in favor of plaintiff against said defendants, granting plaintiff's motion for preliminary injunction.

/s/ Michael A. Katz
MICHAEL A. KATZ
Asst. U.S. Atty.
Attorney for defendants

Room 3433, U.S. Courthouse
Washington, D.C. 20001
426-7381

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1973

Civil Action 1863-73

[Filed Apr. 5, 1974, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 74-1363

RAYMOND G. DECHAMPLAIN, United States Air Force

*v.*

JOHN L. MCLUCAS, Secretary of the Air Force, ET AL., APPELLANT

Before: Wright and MacKinnon, Circuit Judges

ORDER

[Filed April 5, 1974, as amended May 17, 1974]

On consideration of appellants' motion to extend time to docket appeal, of the opposition thereto, of appellants' reply and of appellee's motion for leave to file supplemental reply memorandum, of the response thereto and of appellee's motions to dismiss and for release pending appeal, included in appellee's opposition, it is

ORDERED by the Court that the Clerk is directed to file appellee's aforesaid supplemental reply memorandum and on consideration of all of the foregoing, it is

FURTHER ORDERED by the Court that appellants' aforesaid motion is granted and the time for docketing the record in this appeal is extended for a period of 15 days from the date of the final decision of the Supreme Court in the matter of *McLucas, et al.* v. *DeChamplain*, No. 73-1346, and, it is



FURTHER ORDERED by the Court that the aforesaid motion to dismiss is denied, and, it is

FURTHER ORDERED by the Court that appellee's motion for release pending appeal is denied without prejudice to its being submitted to the District Court.

PER CURIAM

SUPREME COURT OF THE UNITED STATES

No. 73-1346

JOHN L. MCLUCAS, Secretary of the Air Force, ET AL.,
APPELLANTS

*v.*

RAYMOND G. DECHAMPLAIN

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The statement of jurisdiction having been submitted in this case and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

June 24, 1974

☆ U. S. GOVERNMENT PRINTING OFFICE, 1974 554808 27

Supreme Court, U. S.
FILED
APR 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**October Term, 1973**

**No. 73-1346**

JOHN L. McLUCAS, Secretary of the Air Force, *et al.*,

*Appellants,*

v.

RAYMOND G. DeCHAMPLAIN,

*Appellee.*

## MOTION TO DISMISS

LEONARD B. BOUDIN
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*Attorneys for Appellee*

April 3, 1974

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IN THE

# Supreme Court of the United States

**October Term, 1973**

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**No. 73-1346**

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JOHN L. MCLUCAS, Secretary of the Air Force, *et al.*,

*Appellants,*

v.

RAYMOND G. DECHAMPLAIN,

*Appellee.*

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## MOTION TO DISMISS

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The instant appeal arises in the following context. The district court enjoined the enforcement of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934, an Act of Congress, and further enjoined appellee's court-martial on any and all charges until his civilian defense counsel is granted full access to relevant evidence and documents. The government appealed directly to this Court pursuant to 28 U.S.C. § 1252, alleging jurisdiction because the district court had held an Act of Congress to be unconstitutional.

Appellee submits that Article 134 is so clearly unconstitutional that the appeal should be dismissed for failure to raise a substantial federal question. In the alternative, however, should the Court find that there does exist a substantial question as to the constitutionality of Article 134, it must find that it lacks jurisdiction over the instant appeal.

The government's right to take a direct appeal to this Court pursuant to 28 U.S.C. § 1252 rests solely on the district court's action in holding Article 134 unconstitutional. While if the Court finds it has jurisdiction on the appealable issue, it may decide all other issues in the case, *United States* v. *Raines*, 362 U.S. 17, 27 n. 7 (1960), jurisdiction over those other issues is pendent to jurisdiction over the appealable issue. Thus, if the Court finds that it lacks jurisdiction on the Article 134 question, or if the question is not substantial, jurisdiction over the entire appeal must fall.

## POINT I

### The Appeal Fails to Raise a Substantial Question With Respect to the Constitutionality of an Act of Congress.

The district court did not fashion its own holding that Article 134 is unconstitutional; it merely followed the prior decisions of the Court of Appeals for the District of Columbia to that effect. *Avrech* v. *Secretary of the Navy*, 477 F.2d 1237 (D.C. Cir. 1973); *Hooper* v. *Laird*, 482 F.2d 784 (D.C. Cir. 1973). *Accord*, *Levy* v. *Parker*, 478 F.2d 772 (3d. Cir. 1973). See Jurisdictional Statement (J.S.) at 20. This, of course, the district court was required to do.

The present appeal must be viewed in its proper context. The question of the constitutionality of Article 134 was argued before the Court on February 20th. *Secretary of the Navy* v. *Avrech*, No. 72-1713; *Parker* v. *Levy*, No. 73-206. That question presumably will be decided this term, well before the merits of the instant case can be reached. If the decisions in *Avrech* and *Levy* are affirmed, the district court's decision here will have been correct, and no substantial federal question will remain. If *Avrech* and *Levy* are reversed, the district court's decision here with respect to Article 134 should be vacated summarily; again, no substantial federal question warranting this Court's plenary review on direct appeal would exist. Thus, in either event, the instant appeal pursuant to 28 U.S.C. § 1252 must be dismissed.



The government seeks to avoid this result by urging that appellee in the instant case was charged with a violation of the third clause of Article 134, while *Avrech* and *Levy* were charged with violations of clauses one and two. J.S. at 10-11. The government's argument assumes that Article 134 is readily divisible into three neat, distinct statutes, and that therefore *Avrech* and *Levy* do not govern the outcome here. This simply is not the case. The charge against appellee here does not allege a violation of "Article 134, clause 3," but rather alleges "Violation of the Uniform Code of Military Justice, Article 134." While the specifications of the charges allege violations of particular federal statutes, that does not limit appellee's vulnerability to conviction to proof of violation of those specific statutes. Indeed it is clear that appellee may be convicted pursuant to clause one or two of Article 134 even if proof is insufficient to convict under the civilian federal statutes specified. The question was raised and answered, based upon a full analysis of the cases, in Moyer, *Justice and the Military*, § 5-163, p. 1004 (PLEI 1972):

> "May a conviction [for violation of a federal criminal statute] be sustained when, for example, there is a failure of proof of one element or when the conduct on which a prosecution is based clearly lacks one of the elements of the civilian crime?
>
> "Under military case law, such a failing does not preclude a conviction provided the conduct is prejudicial to good order and discipline or is service discrediting. Even if all the elements of the civilian

offense cannot be proved, a serviceman may be convicted under clause 1 or 2. Accordingly, a clause 1 or 2 offense may be based generally on a civilian offense without being bound to its elements."

Thus, in *United States* v. *Long*, 2 USCMA 60, 6 CMR 60 (1952), the accused was charged with violating Article 134 for assaulting a government witness. The specification alleged a violation of 18 U.S.C. § 241 (now 1503). The Court of Military Appeals rejected the accused's argument that the government must prove a violation of the federal statute cited in the specification, ruling that the reference to that statute was mere surplusage, that the charge alleged a violation of Article 134, and affirming the conviction under clauses 1 and 2.

Similarly, in *United States* v. *Blevens*, 5 USCMA 480, 18 CMR 104 (1955), the accused was charged under Article 134 for allegedly violating the Smith Act. The case was tried as a violation of that Act, and the law officer instructed the court-martial according to it. The Court of Military Appeals affirmed the conviction under the "service discrediting" clause of Article 134.

See also *United States* v. *White*, 7 CMR 764 (AFBR 1953), in which convictions under two specifications alleging offenses under 18 U.S.C. § 281 (now § 203(a)) were affirmed under clause 2; *United States* v. *Harvey*, 19 USCMA 539, 42 CMR 141 (1970), where the Court of Military Appeals affirmed a clause 1 offense as a lesser included offense of a clause 3 charge; *United States* v. *Perkins*, 47 CMR 259 (AFBR 1973), where the Air Force Court of Military Review indicated that an Article 134 charge specifying violation of the espionage acts of the United States could result in a conviction under the first two clauses of Article 134.



Thus, where, as here, the military charges a violation of Article 134, specifying a violation of a federal criminal statute, the accused nevertheless is put in serious jeopardy of conviction pursuant to the first two clauses of that Article. Consequently, the vices of vague penal statutes which were the basis of constitutional attacks in *Avrech* and *Levy* are equally applicable to the instant case. The Court's decisions in *Avrech* and *Levy* will dispose of the constitutional issue here.

## POINT II

**If the Appeal Does Raise a Substantial Constitutional Question With Respect to Article 134, then this Court Does Not Have Jurisdiction of the Appeal.**

If this Court should determine that a substantial question of constitutional law does remain with respect to Article 134, then the Court nevertheless lacks jurisdiction over the appeal. For in that case, the district court judge, acting alone, lacked jurisdiction to enter an order restraining the enforcement of Article 134. Rather, he was required to convene a three-judge court to hear and decide that issue. 28 U.S.C. § 2282; *Idlewild Bon Voyage Liquor Corp* v. *Epstein*, 370 U.S. 713 (1962). And it has long been the rule that this Court may not review injunctions entered by a single district judge that required the consideration of a three-judge court:

> "If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three

> judges in accordance with the statutory requirement. Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court." *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U.S. 10, 15-16 (1930). See also *Hicks* v. *Pleasure House, Inc.*, 404 U.S. 1, 3 (1971).

The *Stratton* Court suggested that no appeal would lie to the Courts of Appeals from such injunctions erroneously entered by a single district judge. An aggrieved party, however, was not left without a remedy to vacate the order:

> "Accordingly, where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus to vacate the order or decree entered by the District Judge and directing him, or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction. . . . *This remedy would not be available if there were a remedy by appeal. . . .*" *Id.* at 16 (emphasis added).

More recently, the Court drew back from its suggestion in *Stratton* that no relief could be sought in the Courts of Appeals. In *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, *supra*, it held that an aggrieved party could seek relief in the Court of Appeals from the failure of a district judge to convene a three-judge court. The Court of Appeals could not review the merits of the single judge's decision, over which it still lacked jurisdiction under the *Stratton* doctrine, but it could give "guidance" to the district court as to whether a three-judge court was required. Subsequent decisions of this Court made plain that such "guidance" was as binding upon the district courts as are other decisions of the Courts of Appeals. *Hicks* v. *Pleasure House, Inc.*, *supra*; *Schackman* v. *Arnebergh*, 387 U.S. 427 (1967); *Buchanan* v. *Rhodes*, 385 U.S. 3 (1966). Consequently, those cases held that the extraordinary remedy of mandamus to the Supreme Court, available after *Stratton*, was no longer necessary and thus could not be had. The party aggrieved by the district judge's action must seek relief in the Court of Appeals and not in the Supreme Court. See *Hicks*, *Schackman*, *Buchanan*, *supra*; Wright, *Law of Federal Courts* (2d Ed. 1970), §50, p. 193.



Accordingly, if the Article 134 question raised in this case is at all substantial, the instant appeal must be dismised. Appellant's relief lies only through an appeal to the Court of Appeals for the District of Columbia Circuit.

It should be noted, however, that the district court judge need not nor should not have convened a three-judge court to consider the entirely separate claims of access to documents and conduct of the trial. These claims had absolutely no relevance to the claim that Article 134 was unconstitutional. While a single judge should remit to a three-judge court determination of all the issues, constitutional and non-constitutional, concerning the validity of the *statute* challenged, *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960),[1] a single judge should

1. Even then, the preferred procedure is for the single judge to decide the non-constitutional issues relating to the statute's interpretation and application, either before or after consideration of the constitutional issue by the three-judge court. *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970); *Norton* v. *Richardson*, 352 F.Supp. 596, 599 (D.Md. 1972); *Doe* v. *Lavine*, 347 F.Supp. 357 (SDNY 1972); *Doe* v.

*(Footnote continued on next page)*

himself decide independent joined claims not relating to the validity or interpretation of that statute.[2] Indeed, the three-judge court probably would lack jurisdiction to decide such independent claims.[3]

In any event, the single judge in the instant case certainly had jurisdiction to decide the independent federal questions raised other than the constitutionality of Article 134. The district court's determination of those issues, however, is not appealable directly to this Court pursuant to 28 USC § 1252, because it did not involve the constitutionality of an Act of Congress. Thus, the Court may not decide those issues at this time *unless* it notes jurisdiction over the Article 134 question. *United States* v. *Raines*, *supra*. Appellant must seek review in the normal manner in the Court of Appeals.

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*(Footnote continued from previous page)*

*Gillman*, 347 F.Supp. 482, 483 (N.D.Iowa 1972); *Hubert* v. *Saucier*, 347 F.Supp. 152 (N.D.Ga. 1972); *Linnane* v. *Betit*, 331 F.Supp. 868 (D. Vermont 1971); *Saddler* v. *Winstead*, 327 F.Supp. 568 (N.D. Miss. 1971); *Woolfolk* v. *Brown*, 325 F.Supp. 1162 (E.D.Va. 1971); *Doe* v. *Hursh*, 337 F.Supp. 614, 616 (D.Minn. 1970); *Bryant* v. *Carleson*, 444 F.2d 353 (9th Cir. 1971), *cert. den.* 404 U.S. 967 (1971); *Chicago, Duluth, Georgian Bay Transit Co.* v. *Nims*, 252 F.2d 317 (6th Cir. 1958).

2. *Landry* v. *Daley*, 280 F.Supp. 929, 937-938 (N.D.Ill. 1967), 288 F.Supp. 194, 197-199 (N.D.Ill. 1968); *Hobson* v. *Hansen*, 256 F.Supp. 18 (D.D.C. 1956); *Jehovah's Witnesses in State of Wash.* v. *King County Hosp.*, 278 F.Supp. 488, 496-497 n.6 (W.D.Wash. 1967), *aff'd* 390 U.S. 598 (1968); *ABC Books, Inc.* v. *Benson*, 315 F.Supp. 695, 703 (M.D.Tenn. 1970); *Ascheim* v. *Quinlan*, 314 F.Supp. 685 (M.D.Pa. 1970); *Tillman* v. *Dade County School Board*, 327 F.Supp. 927, 930 (S.D.Fla. 1971); Wright, *Law of Federal Courts*, *supra* at 191.

3. See *Pittsburgh & W.V.Ry. Co.* v. *United States*, 281 U.S. 479, 488 (1930); *New York Central Sec. Corp.* v. *United States*, 287 U.S. 12 (1932); *Powell* v. *United States*, 300 U.S. 276, 289-290 (1937); Wright, *Law of Federal Courts*, *supra* at 191.



## CONCLUSION

**The Appeal Should be Dismissed.**

Respectfully submitted,

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No. 73-1346

# In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN L. MCLUCAS, SECRETARY OF THE AIR FORCE, ET AL., APPELLANTS

*v.*

RAYMOND G. DECHAMPLAIN

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

## BRIEF IN OPPOSITION TO MOTION TO DISMISS

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**BRIEF IN OPPOSITION TO MOTION TO DISMISS**

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The two points asserted in appellee's motion to dismiss warrant a brief reply.

1. Appellee contends that this appeal fails to present a substantial federal question because the constitutionality of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934, is presently pending before this Court in *Secretary of the Navy* v. *Avrech*, No. 72-1713, argued February 20, 1974, and *Parker* v. *Levy*, No. 73-206, argued February 20, 1974.

Even assuming that the Article 134 issue will be decided in *Avrech* and *Levy*, jurisdiction should be noted in this case. This Court's decisions in *Avrech* and *Levy* would be dispositive only if this Court were to hold Article 134 in its entirety unconstitutional on its face. Any other disposition of *Avrech* and *Levy* would not be controlling in the instant case, since appellee makes no claim that the conduct with which he was charged

is constitutionally protected, and since appellee was charged under the third clause of Article 134 ("crimes and offenses not capital"), which is not involved in *Avrech* and *Levy*.

Appellee does not, and could not, contend that the third clause of Article 134 is impermissibly vague. Instead, DeChamplain asserts that he is "in serious jeopardy of conviction pursuant to the first two clauses of that Article" ("all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces") (Motion to Dismiss, p. 5). Even if this argument were meritorious, it would not support the injunction entered by the district court, which bars a court-martial under all three clauses of Article 134. This fact alone demonstrates that the decision below was incorrect.

DeChamplain is charged only under the third clause and, contrary to his assertions, he is not in jeopardy of being tried under the first two clauses of Article 134. The Manual for Courts-Martial, paragraph 213(a), published as E.O. 11476, 34 Fed. Reg. 10502, 10879, does provide:

> Although evidence presented at the trial of an offense alleged under Article 134 may be insufficient to establish the commission of a crime or offense not capital, it may nevertheless be sufficient to establish a disorder or neglect to the prejudice of good order and discipline or service-discrediting conduct and thus support a conviction.

See, *e.g.*, *United States* v. *Long*, 2 U.S.C.M.A. 60, 6 C.M.R. 60; compare, *United States* v. *Smith*, 21 U.S.C.M.A. 264, 45 C.M.R. 38; *United States* v. *Rowe*, 13 U.S.C.M.A. 302, 32 C.M.R. 302. In reviewing DeChamplain's first conviction, however, the Air Force Court of Military Review held that he had been prosecuted only under the third clause. *United States* v. *DeChamplain*, ACM 21034, 46 C.M.R. 784, affirmed, 22 U.S.C.M.A. 150, 46 C.M.R. 150.[1] As the present charges are based upon the previous charges, DeChamplain's argument that he is "in serious jeopardy" of conviction under the first two clauses of Article 134 is incorrect.



In any event, DeChamplain's argument demonstrates that civilian courts should defer their review until after the court-martial and the military appeals have been completed. If the vagueness issue were presented at that time, there would be no need for the court to speculate whether an accused faced possible conviction under the first two clauses as well as the third clause of Article 134.

Indeed, this case convincingly demonstrates the wisdom of deferring civilian court review until the court-martial and military appeals have been concluded. Had the second court-martial been allowed to proceed, issues now pending in civilian courts would never have arisen, such as whether DeChamplain faced the possibility of conviction under the first two clauses of Article 134, the propriety of pre-trial confinement,[2] and whether a three-judge court was required.

---

[1]This holding adopted DeChamplain's position. In contrast to his position in this Court, DeChamplain argued in his first court-martial that he was charged solely under the third clause. See *United States* v. *DeChamplain*, *supra*, 46 C.M.R. at 788.

[2]DeChamplain recently filed a petition in the Court of Military Appeals challenging the legality of his present confinement. On April 17, 1974, that petition was dismissed. *DeChamplain* v. *Lovelace*, Misc. No. 74-28. DeChamplain also unsuccessfully sought

2. DeChamplain's second contention is that this Court lacks jurisdiction of the appeal because this case required a three-judge district court (Motion to Dismiss, pp. 5-8).[3] The premise of this argument is that the preliminary injunction which DeChamplain moved the single-judge district court to enter, without requesting a court of three judges, is improper. See Plaintiff's Motion for Preliminary Injunction, filed October 3, 1973.

DeChamplain states that "it has long been the rule that this Court may not review injunctions entered by a single district judge that required the consideration of a three-judge court * * *" (Motion to Dismiss, p. 5). The authorities cited for that proposition,[4] however, merely

---

his release in the court of appeals (No. 74-1363) and the district court (Civ. No. 1863-73) in the District of Columbia. Currently he is challenging his pre-trial confinement in a petition for *habeas corpus* in the District Court for the Western District of Missouri. *DeChamplain* v. *Lovelace* (Civ. No. 74CV169-3-W).

[3]DeChamplain apparently suggests that this action should be further fragmented if remanded by having some issues considered by a three-judge district court, whose decision would be appealable to this Court, and other issues decided by a single-judge court, whose decision would be reviewable in turn by the court of appeals and then this Court (Motion to Dismiss, pp. 7-8).

[4]*Hicks* v. *Pleasure House, Inc.*, 404 U.S. 1; *Schackman* v. *Arnebergh*, 258 F. Supp. 983 (C.D. Cal.), appeal dismissed, 387 U.S. 427; *Buchanan* v. *Rhodes*, 249 F. Supp. 860 (N.D. Ohio), appeal dismissed, 385 U.S. 3; *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U.S. 10.



hold that 28 U.S.C. 1253 does not authorize a direct appeal in such circumstances; none of these precedents bars a direct appeal under 28 U.S.C. 1252. This appeal is expressly authorized by Section 1252, because it involves review of "an interlocutory or final * * * order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action * * * to which" an officer of the United States is a party. If, however, as DeChamplain argues, the court below lacked jurisdiction, this Court should vacate the preliminary injunction. See *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U.S. 977; *Flemming* v. *Nestor*, 363 U.S. 603, 607.[5]

We submit that a three-judge district court was not required in this case. DeChamplain sought (Plaintiff's Motion for Preliminary Injunction, *supra*) and obtained (J.S., p. 29), an injunction only against his own court-martial under Article 134. He did not seek "to paralyze totally the operation of an entire regulatory scheme * * *." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154. Here, as in *Flemming* v. *Nestor*, *supra*, the constitutionality of a federal statute has been drawn into question, but the suit does not "seek affirmatively to interdict the operation of a statutory scheme." 363 U.S. at 607.

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[5]As a precautionary measure, we also filed a notice of appeal to the Court of Appeals for the District of Columbia Circuit from the preliminary injunction. On April 5, 1974, the court of appeals denied DeChamplain's motion to dismiss that appeal and, acting on our motion, extended the time for docketing the record until fifteen days after the final decision of this Court of the direct appeal. *DeChamplain* v. *McLucas*, No. 74-1363 (C.A.D.C.).

For these reasons, the single-judge court below could properly consider the merits of this dispute, and the entire case is now properly before this Court.[6]

Moreover, whether or not the single-judge court below properly reached the issue of the constitutionality of Article 134, that court could decide the threshold issue of "whether the complaint at least formally alleges a basis for equitable relief * * *." *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 715. DeChamplain's complaint fails to meet this test because, as shown in our Jurisdictional Statement, pp. 6-9, no civilian court can properly enjoin a pending court-martial under the circumstances alleged. Accordingly, even if the constitutional issue presented required a three-judge court, the threshold issue could be decided by the single-judge court below, and this Court has the power on this appeal to reverse the erroneous resolution of that issue.

For these reasons, together with those set forth in our Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted.

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MAY 1974.

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[6]But compare Kennedy v. *Mendoza-Martinez, supra* and *Fleming* v. *Nestor, supra,* with *Steffel* v. *Thompson,* No. 72-5581, decided March 19, 1974, n. 7 (dictum), and *Schneider* v. *Smith,* 390 U.S. 17; see *Torres* v. *Connor,* 329 F. Supp. 1025 (N.D. Ga.).

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# In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1346

JOHN L. MCLUCAS, SECRETARY OF THE AIR FORCE, ET AL., APPELLANTS

*v.*

RAYMOND G. DECHAMPLAIN

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

## BRIEF FOR THE APPELLANTS

### OPINION BELOW

The opinion of this district court (J.S. App. 15-28) is reported at 367 F. Supp. 1291.

### JURISDICTION

The preliminary injunction of the district court (J.S. App. 29–30) was entered November 13, 1973. A notice of appeal to this Court (J.S. App. 31) was filed on December 12, 1973. On February 12, 1974, the Chief Justice extended the time for docketing the appeal to March 4, 1974, and on that date the jurisdictional statement was filed. On June 24, 1974, this Court postponed further consideration of the question

of jurisdiction to the hearing of the case on the merits (App. 78). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

## QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. 1252 to review an order of a single-judge district court preliminarily enjoining a serviceman's pending court-martial under Article 134 of the Uniform Code of Military Justice ("U.C.M.J."), 10 U.S.C. 934, on the ground that this statute is unconstitutionally vague.

2. Whether a district court may enjoin the pending court-martial of a serviceman.

3. Whether the third clause of Article 134 of the U.C.M.J., 10 U.S.C. 934, which confers court-martial jurisdiction over "crimes and offenses not capital," is unconstitutionally vague.

4. Whether the district court properly invalidated restrictions on access to and use of classified documents by the accused serviceman's civilian counsel.

## STATUTES INVOLVED

28 U.S.C. 1252 provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.



28 U.S.C. 1331(a) provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934, provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

## STATEMENT

Appellee Air Force Master Sergeant Raymond G. DeChamplain brought this action in the district court to enjoin the Secretary of the Air Force and five Air Force officers from retrying him by general court-martial pursuant to the order of the Air Force Court of Military Review (see App. 6–18). DeChamplain is charged with: (1) conspiring to communicate classified information to an agent of a foreign government, in violation of Articles 81 and 134 of the Uniform Code of Military Justice and 50 U.S.C. 783(b); (2) failing to obey an Air Force regulation requiring the reporting of contacts with foreign agents, in violation of Article 92, U.C.M.J., and (3) violating Article 134, U.C.M.J., by copying classified documents in violation of 18 U.S.C. 793(b), and by attempting to deliver such copies to an unauthorized person in violation of 18 U.S.C. 793(d). The district court preliminarily enjoined the Air Force from (1) trying DeChamplain on any charges based upon Article 134, and (2) trying him on any charges whatsoever, without granting full and unlimited access to all documents material to the case to "[DeChamplain], his civilian defense counsel and such legal associates and assistants, subject to an appropriate protective order, as are necessary to said counsel's adequate preparation for trial" (J.S. App. 30). This appeal followed.

The events preceding the present action relating to the espionage charges against DeChamplain, as developed in his first court-martial, are set forth in the opinion of the Air Force Court of Military Review



in *United States* v. *DeChamplain*, 46 C.M.R. 784, affirmed, 22 U.S.C.M.A. 150, 46 C.M.R. 150.[1] In June 1971, while DeChamplain was stationed in Thailand, a Thai policeman observed him conversing on two occasions with an official of the Soviet Embassy in Bangkok. This information was relayed to the Air Force and following an investigation, DeChamplain was apprehended on July 2, 1971. At the time of his apprehension, he had in his possession twenty-four official documents, some of which were marked "Top Secret." 46 C.M.R. at 792.

DeChamplain was then taken to an Air Force facility outside Bangkok where he was advised of his rights, interrogated, and confined. 46 C.M.R. at 792–793. During the interrogation, DeChamplain remained silent, but he responded to questions by nodding and shaking his head. *Ibid.* Subsequently, on July 7, 8, 12, and 13, DeChamplain made eight separate statements regarding the alleged offenses. 46 C.M.R. at 795, n. 11.

DeChamplain pleaded not guilty and was tried by general court-martial on November 12, 1971, at Anderson Air Force Base in Guam. 46 C.M.R. at 896. Over his objection, the eight statements were admitted as evidence. 46 C.M.R. at 795, n. 11. DeChamplain was convicted of all charges and specifications and sentenced to a dishonorable discharge, confinement at

[1] This Court may take judicial notice of that opinion. See *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 157–158; 9 Wigmore, *Evidence*, § 2579 (3d ed., 1940). Of course, DeChamplain will have an opportunity at his second court-martial to argue that these facts have not been proved beyond reasonable doubt.

hard labor for fifteen years, forfeiture of all pay and allowances, and reduction to the lowest enlisted rank. 46 C.M.R. at 787.

This conviction was reversed by the Air Force Court of Military Review on October 5, 1972. *United States* v. *DeChamplain, supra.* In a 2–1 decision, that court concluded that DeChamplain's inculpatory statements should not have been admitted into evidence because an Air Force investigator had improperly continued to question DeChamplain after DeChamplain had communicated a desire to remain silent. 46 C.M.R. at 799–803. The case was remanded for a rehearing.

The Air Force Judge Advocate General sought review of this decision in the Court of Military Appeals pursuant to Article 67(b)(2), U.C.M.J., 10 U.S.C. 867 (b)(2). On February 16, 1973, that Court affirmed the decision of the Court of Military Review. *United States* v. *DeChamplain,* 22 U.S.C.M.A. 150, 46 C.M.R. 150.

Pursuant to the order of the military appellate courts, the Air Force then prepared to retry DeChamplain before a second general court-martial upon substantially the same charges. The charges were amended, however, by deleting all allegations pertaining to three of the classified documents that DeChamplain had previously been accused of attempting to deliver to the Russians (App. 20–28; J.S. App. 16, n. 1). As to these documents, the Air Force chose to forego prosecuting DeChamplain rather than to compromise the confidentiality of the



information (*ibid.*). In addition, the Air Force determined not to introduce twelve other classified documents, which had been admitted at the first court-martial, because of their connection with the confessions held invalid by the Court of Military Appeals. DeChamplain's two military counsel have been permitted to review the entire record of the former proceedings, but they are prohibited from discussing with the civilian defense team those classified portions to which the civilian team has not been granted access (J.S. App. 22, n. 7; App. 56–58).

The Air Force authorized DeChamplain, his military counsel, his chief civilian counsel, one civilian associate counsel, and one civilian secretary to have access to all nine remaining classified documents which it intends to introduce as evidence and upon which the charges are based. The following restrictions, however, have been imposed upon the use of the classified data (App. 27):

> (A) The documents may not be released to civilian counsel; (B) They may see and read the documents only in the presence of one holding the appropriate security clearance; (C) They may not make copies of the documents; (D) No witten notes made by them with respect to classified information contained in said documents may be removed from Air Force control; and (E) They will be advised of applicable laws and penalties for unauthorized release of classified info[rmation].

DeChamplain challenged these restrictions at a hearing conducted pursuant to Article 39, U.C.M.J.,

10 U.S.C. 839, preceding the second court-martial. The military judge sustained the restrictions (App. 62). The court's order also specified that the three-man civilian defense team would be granted access not only to the classified documents upon which the charges are based, but also to those portions of the prior court-martial record relating thereto, subject to the conditions applicable to the nine documents themselves (*ibid.*). DeChamplain also moved to dismiss the charges on various other grounds, including the asserted unconstitutionality of Article 134 (App. 56). The military trial court denied the motions to dismiss.

DeChamplain also filed three successive petitions for extraordinary relief in the Court of Military Appeals asserting a number of defenses, including a denial of access to relevant classified documents, the unconstitutionality of Article 134, and challenges to his pretrial confinement. All of these petitions were denied. *DeChamplain* v. *United States*, 22 U.S.C.M.A. 211, 46 C.M.R. 211, *DeChamplain* v. *United States*, 46 C.M.R. 1329; *DeChamplain* v. *McLucas*, 22 U.S.C.M.A. 462; 47 C.M.R. 552. In dismissing the second petition as "wholly unfounded," the Court of Military Appeals stated (46 C.M.R. at 1330):

> Invocation of the extraordinary powers of this Court granted by 28 U.S.C. 1651(a) is a last resort, not a first thought. It is apparent that counsel who submitted the first and second petitions under that Act are either unaware, or heedless, of that basic tenet.

Similarly, in denying the third petition, the Court emphasized that "[a] petition for extraordinary relief



is not a substitute for appeal." 22 U.S.C.M.A. at 462; 47 C.M.R. at 552.

DeChamplain's second general court-martial was scheduled to begin on November 15, 1973, at Richards-Gebaur Air Force Base, Missouri (J.S. App. 15). Since his arrest in July 1971 and throughout these proceedings, DeChamplain has been in military confinement (J.S. App. 23).

On October 3, 1973, DeChamplain brought this action in the District Court for the District of Columbia to enjoin his court-martial. The complaint (App. 6–18) alleged four causes of action: (1) the asserted unconstitutional vagueness of Article 134; (2) a claimed denial of due process and effective assistance of counsel because of the limitations on access to and use of classified documents; (3) an alleged denial of a public trial based upon the military trial court's ruling that persons who do not possess the necessary security clearance might be excluded from the courtroom during those portions of the court-martial when classified materials are introduced or discussed (see App. 66–67); and (4) an alleged denial of effective assistance of counsel by the Air Force's refusal to authorize DeChamplain's military counsel to represent him in collateral civilian judicial proceedings against the Air Force (see App. 32).

Asserting that he would be injured irreparably if the court-martial proceeded (App. 10, 13, 15, 16), DeChamplain also moved for a preliminary injunction (App. 34–35). The government then moved to dismiss the action for lack of subject-matter jurisdiction and

failure to state a claim upon which relief can be granted (App. 59).

Following the submission of briefs, affidavits, and exhibits and after hearing oral argument,[2] the district court issued the preliminary injunction (J.S. App. 29–30). The court first held that it could review the merits of DeChamplain's claims while his court martial is pending (J.S. App. 19–20). Next, the court held that DeChamplain could not be tried on the two charges under Article 134 because that Article is unconstitutionally vague (J.S. App. 20). Finally, the court ruled that the restrictions imposed upon access to and use of classified documents by DeChamplain's civilian counsel preclude a fair trial (J.S. App. 21–22).[3]

Upon these determinations, the district court preliminarily enjoined the Air Force from requiring DeChamplain "to submit to a court-martial which includes charges based upon Article 134" (J.S. App. 29–30). The injunction also prevents the prosecution of DeChamplain upon any charge unless "full and unlimited access to documents relevant and material to" the case is granted to DeChamplain, his civilian

[2] On November 8, 1973, one day prior to the hearing in the district court, DeChamplain moved to amend his motion for preliminary relief and raised a new issue regarding alleged interception of the oral and written communications of DeChamplain and his counsel (App. 73–74). The district court's opinion did not discuss this issue (J.S. App. 15–28).

[3] The district court did not decide the two other claims raised in the complaint concerning DeChamplain's representation by military counsel in civilian proceedings and possible exclusion of the public during portions of the second court-martial (see J.S. App. 17 n. 3, 22–23).



counsel, "and such legal associates and assistants, subject to an appropriate protective order, as are necessary to said counsel's adequate preparation for trial." (J.S. App. 30). Specifically, the court directed that the entire record of the first court-martial (including the text of the fifteen documents not involved in the second court-martial) be delivered to civilian counsel (*ibid.*).[4]

The government filed notices of appeal from this preliminary injunction to both this Court (J.S. App. 31) and the Court of Appeals for the District of Columbia Circuit (App. 75). On April 5, 1974, the court of appeals extended the time for docketing the record in that court to fifteen days after this Court's final decision in the present appeal.[5] On June 24, 1974, this Court postponed further consideration of the question of jurisdiction to the hearing on the merits (App. 78).

[4] Following the district court's decision, the Air Force authorized two consultants, who had been selected by DeChamplain's counsel (see App. 38), to have access to the same classified materials disclosed to his civilian counsel (J.S. App. 32–33). The same restrictions upon the use of these materials apply to the consultants.

[5] The court of appeals also declined to order DeChamplain released from pretrial confinement (App. 77). The Court of Military Appeals and the District Court for the District of Columbia have also refused to order DeChamplain released pending trial. *DeChamplain* v. *Lovelace*, Misc. No. 74–28 (U.S.C.M.A., April 17, 1974); *DeChamplain* v. *McLucas*, Civ. No. 1863–73 (D. D.C., May 6, 1974). In addition, DeChamplain contested his confinement in a petition for *habeas corpus* in the Western District of Missouri which was denied on September 26, 1974. *DeChamplain* v. *Lovelace*, Civ. No. 74CV169–3–W.

## SUMMARY OF ARGUMENT

### I

In view of the Court's order postponing consideration of jurisdiction, we first demonstrate that this Court has jurisdiction over the appeal pursuant to 28 U.S.C. 1252. That provision authorizes direct review of interlocutory orders of any court of the United States holding an Act of Congress unconstitutional in a civil action to which a government officer or employee is a party. DeChamplain contends that this Court lacks jurisdiction because the single-judge district court below was powerless to issue the injunction that he sought and received.

A three-judge court was not required to consider the threshold questions of whether civilian courts have jurisdiction over actions to enjoin pending court-martials and whether a complaint seeking such relief "formally alleges a basis for equitable relief." *Idlewild Bon Voyage Liquor Corp* v. *Epstein,* 370 U.S. 713, 715. As these threshold issues are dispositive in the present case, it follows that this Court can reverse the decision of the court below and direct that the complaint be dismissed.

Even the issue of the constitutionality of Article 134 does not require a three-judge district court. DeChamplain does not seek "to paralyze totally the operation of an entire regulatory scheme," *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 154, and he raises no substantial constitutional issue. The clause of Article 134 involved here merely assimilates federal crimes not separately specified in the Uniform Code of Military Justice and such assimilation of laws by reference is not unduly vague. *United States* v. *Sharpnack,* 355 U.S. 286, 293. Accordingly, no aspect of this case need be remanded for consideration by a three-judge court.



### II

A civilian court may not enjoin a pending court-martial of a serviceman. Congress has provided in Article 76 of the U.C.M.J., 10 U.S.C. 876, that "all actions taken pursuant to those [court-martial] proceedings [by the military courts] are binding upon all * * * courts * * * of the United States * * *." The history of that provision discloses that Congress intended to limit civilian court review of court-martial proceedings to *habeas corpus* actions. By reviewing pretrial rulings of the military courts in this case, the district court violated the clear statutory scheme and legislative intent of the finality provision.

*Younger* v. *Harris,* 401 U.S. 37, holds that basic considerations of equity jurisprudence and the policy of federalism bar interference by a federal court with a state criminal prosecution save perhaps in cases of prosecution under a flagrantly unconstitutional statute or where there has been "official lawlessness" in the statute's enforcement. The same considerations apply to interference with military courts, augmented by the congressional decision that military court judgments should be unreviewable by the civilian courts, save by writ of *habeas corpus.* Constitution, Art. I, § 8; 10 U.S.C. 876; *Gusik* v. *Schilder,* 340 U.S. 128.

An application of these principles to the instant case plainly reveals that there was no basis for the district court's interference. Petitioner was charged

under a portion of Article 134 the constitutionality of which is not seriously challenged, and even the other portions of that Article have been upheld by this Court. *Parker* v. *Levy,* No. 73–206, decided June 19, 1974. Nor is there any contention or finding that the military court's restrictions on access to classified material even approaches "official lawlessness."

Finally, the grounds given by the district court for intervention are in error. Even if the issue here is one for which military courts have no special competence, that does not authorize district court intervention in the face of the many other policies opposing premature review. *Noyd* v. *Bond,* 395 U.S. 683, 693–698. The fact that the district court refused to release DeChamplain from confinement vitiates its argument that it could intervene because of the possibility of his incarceration pending trial and during appeal. In any event, the prospect of such confinement does not warrant interference with a pending prosecution. *Younger, supra,* 401 U.S. at 49.

## III

Though lacking jurisdiction to hear DeChamplain's complaint, the district court reached the merits and decided both issues incorrectly. It held Article 134 of the Uniform Code of Military Justice void for vagueness although this case involves only the third clause of Article 134 ("crimes and offenses not capital") which, as a dissenting opinion in *Levy, supra,* recognized, is not subject to vagueness objections. That clause merely assimilates by reference statutes punishing noncapital federal offenses. The espionage charges



against DeChamplain are clearly within the statutory proscription.

The court below also erred in overturning the restrictions upon the disclosure of classified documents. No evidence is being withheld, and the conditions imposed upon the use of the classified materials are reasonable in light of the military's legitimate interest in preventing widespread dissemination of the materials. Moreover, the injunction entered is inconsistent with the court's opinion with respect to mandatory disclosure of fifteen classified documents which are part of the record of the first court-martial, but which are no longer part of the Air Force's case against DeChamplain. The Air Force correctly declined to release these fifteen documents to DeChamplain's civilian defense counsel and his civilian associates, secretaries, and consultants. In addition, the standard of review employed by the district court in reviewing the validity of the restrictions on classified documents conflicts with the standard set forth in *United States* v. *Augenblick,* 393 U.S. 348. Thus, the decision below is incorrect, not only as to the various jurisdictional and threshold issues outlined above, but also as to both substantive issues decided.

## ARGUMENT

### I. THIS COURT HAS JURISDICTION PURSUANT TO 28 U.S.C. 1252 BECAUSE THE COURT BELOW HELD AN ACT OF CONGRESS UNCONSTITUTIONAL IN A CIVIL ACTION TO WHICH OFFICERS OF THE UNITED STATES ARE PARTIES

The government has appealed to this Court under 28 U.S.C. 1252 (see J.S. App. 31), which provides for

direct review "from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action * * * to which * * * any officer or employee [of the United States] * * *, as such officer or employee, is a party." The present appeal fulfills all of these requirements. The district court, a court of the United States (28 U.S.C. 451), has entered an interlocutory order holding Article 134, U.C.M.J., 10 U.S.C. 934, an Act of Congress, unconstitutional in this civil action in which the Secretary of the Air Force and five Air Force officers are sued as defendants in their official capacities (App. 7–8).[6] Appellants are, therefore, properly before this Court.

Appellee DeChamplain attempts to avoid the jurisdiction of this Court, however, by contending in his motion to dismiss (pp. 5–8) that review of the merits may not be had on direct appeal here because the single-judge district court lacked jurisdiction since a three-judge court should have been convened.[7] Aside

[6] The Secretary of the Air Force (see 10 U.S.C. 8012) and commissioned officers of the armed forces serving on active duty (see *United States* v. *Carter*, 217 U.S. 286) are officers of the United States. Cf. *Reid* v. *Covert*, 351 U.S. 487, withdrawn on other grounds, 354 U.S. 1.

[7] DeChamplain's argument also rests upon the assertion that the district court's order may be reviewed by the court of appeals. As a precaution, we have filed a notice of appeal to the Court of Appeals for the District of Columbia Circuit (App. 75; see also, App. 76–77). But it is clear that the court of appeals is denied jurisdiction by 28 U.S.C. 1292(a)(1) because direct review may be had in this Court pursuant to 28 U.S.C. 1252. An appeal challenging the failure of the



from the peculiarity of appellee's attack upon a jurisdiction he successfully invoked, the point is without merit. No three-judge court was required in this case.[8]

The constitutional validity of Article 134 was properly addressed by the district court, although we believe the court's ultimate decision was plainly in error. By authorizing direct appeals from the judgment of "any court of the United States" holding an Act of Congress unconstitutional, 28 U.S.C. 1252, under which appellants seek review, assumes that single-judge district courts may in some cases decide the constitutionality of federal statutes. This case was a proper one for the exercise of that power. DeChamplain sought (App. 34–35) and obtained (J.S. App. 29–30) an injunction only against his own court-martial under Article 134. He did not seek "to paralyze totally the operation of an entire regulatory scheme * * * ." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154. Here, as in *Flemming* v. *Nestor*, 363 U.S. 603, the constitutionality of a federal statute has been drawn into question, but the suit does not "seek affirmatively

single-judge district court to convene a three-judge court would have to be lodged in the court of appeals but appellants make no such challenge and thus, even should this Court ultimately determine, contrary to our submission, that a three-judge court was required, our appeal is properly to this Court under 28 U.S.C. 1252.

[8] Should this Court decide, contrary to our submission, that a three-judge court was required, then, of course, the proper response, in an appeal otherwise properly laid under 28 U.S.C. 1252, would be to vacate the preliminary injunction and remand the case for consideration by a three-judge district court. See *Flemming* v. *Nestor*, 363 U.S. 603, 607; *Federal Housing Administration* v. *The Darlington*, 352 U.S. 977.

to interdict the operation of a statutory scheme," 363 U.S. at 607.[9] In these circumstances, a single-judge district court was empowered to make the constitutional determination envisaged by 28 U.S.C. 1252.

There is an additional reason why a three-judge court was not necessary. A second threshold question for the single-judge district court is "whether the constitutional question raised is substantial." *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715. Here, the district court wrongly decided that it was, relying upon court of appeals decisions, subsequently reversed by this Court, holding the first two clauses of Article 134 unconstitutionally vague. The district court was clearly in error since the specifications in this case were laid under the third clause, an assimilative crimes statute, as to which there was and is no substantial constitutional question of undue vagueness. See *United States* v. *Sharpnack*, 355 U.S. 286, 293. Had there been any possibility that either or both of the first two clauses of Article 134 would come into play in the court-martial, there still would have been no substantial constitutional question that could be raised by DeChamplain since he was charged with espionage rather than unlawful speech and the statute was not vague as to his actions. To put the lid on the matter, even Article 134's application to speech under the first two clauses has since been settled by this Court's decisions in *Parker* v. *Levy*, No. 73–206, decided June 19, 1974, and *Secretary of the Navy* v. *Avrech*, No. 72–1713, decided July 8, 1974. The insubstantiality of the supposed constitutional question being apparent, the case cannot be remanded to a three-judge district court because such a court would lack the power to proceed. See *California Water Service Co.* v. *City of Redding*, 304 U.S. 252. For this reason as well, appellee's contention that the district court below lacked jurisdiction must fail.

[9] But compare *Kennedy* v. *Mendoza-Martinez*, *supra*, and *Flemming* v. *Nestor*, *supra*, with *Schneider* v. *Smith*, 390 U.S. 17, 22; see *Torres* v. *Connor*, 329 F. Supp. 1025 (N.D. Ga.).



There being no challenge to this Court's jurisdiction other than the fallacious contention that the district court lacked power to proceed, it is clear that appellants have properly brought this case up on direct appeal pursuant to 28 U.S.C. 1252.

## II. THE DISTRICT COURT LACKED POWER TO INTERFERE WITH A PENDING COURT-MARTIAL

The district court in this case purported to exercise a jurisdiction it clearly did not possess. Appellee DeChamplain sought, and the court granted, extensive and unwarranted civilian court control of a pending court-martial prosecution. The court enjoined any prosecution of DeChamplain under Article 134 of the Uniform Code of Military Justice and assumed control over crucial aspects of the court-martial's pretrial discovery process. Such interference with the military justice system violates the law established by the rulings of this Court.

The integrity of the military justice system, like the criminal justice systems of the various states, is to be respected by federal courts. Intervention by an Article III court to divert or abort a prosecution in

one of those systems is justified only under unusual circumstances, such as a showing of bad faith or harassment, and when the party seeking relief is threatened with irreparable injury that is both great and immediate. None of the requisite elements has been shown, or even alleged, here. Consequently, the case should be reversed and the court-martial of appellee DeChamplain permitted to proceed.

The applicable principles are laid down by this Court's opinion in *Younger* v. *Harris*, 401 U.S. 37. After discussing that case, we will show that it is as applicable to interference with courts-martial as it is to interference with state criminal prosecutions and then show the inadequacy of the district court's reasons for intervention here.

1. In *Younger* v. *Harris*, *supra*, appellee Harris had been indicted and was being prosecuted by California for violation of its Criminal Syndicalism Act when he filed a complaint in the federal district court to enjoin the prosecution. He alleged that the prosecution, and even the presence of the Act, chilled his exercise of the rights of free speech and press. That complaint, claiming a chilling effect upon First Amendment rights due to a prosecution under a statute of highly dubious constitutionality, certainly presented a stronger case for federal court intervention than does DeChamplain's, whose prosecution is for acts of espionage, behavior that has no constitutional sanction. It is particularly significant, therefore, that this Court, in *Younger*, reversed a three-judge



district court, and held the interference with the state prosecution unjustified.

The *Younger* opinion pointed out that, with few exceptions, Congress has always "manifested a desire to permit state courts to try state cases free from interference by federal courts." 401 U.S. at 43. The "primary sources" of that policy are "the basic doctrine of equity jurisprudence that courts of equity should not act * * * to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief" (*id.* at 43–44) and the constitutional value expressed in federalism (*id.* at 44–45). Moreover, the intervention of federal courts to test statutes on their face, before application to concrete disputes, perhaps leaving the state without a valid law covering dangerous forms of behavior, was an inappropriate task for the judiciary, even where there was a "case or controversy" sufficient to satisfy Article III:

> The combination of the relative remoteness of the controversy, the impact on the legislative process of the relief sought, and above all the speculative and amorphous nature of the required line-by-line analysis of detailed statutes [citation omitted] ordinarily results in a kind of case that is wholly unsatisfactory for deciding constitutional questions, whichever way they might be decided. [401 U.S. at 53.]

The opinion therefore concluded:

> * * * [W]e hold that a federal court must not, save in exceptional and extremely limited

> circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution. Such circumstances exist only when there is a threat of irreparable injury "both great and immediate." A threat of this nature might be shown if the state criminal statute in question were patently and flagrantly unconstitutional on its face * * * or if there has been bad faith and harassment—official lawlessness—in a statute's enforcement * * *. [401 U.S. at 56; footnote, case citation, and internal cross-references omitted.]

*Younger* controls this case if the policy against intervention in state prosecutions applies to military prosecutions. It is clear that it does.

2. One need, perhaps, look no further than this Court's opinion in *Gusik* v. *Schilder,* 340 U.S. 128, to be satisfied that the long-standing policy against interference with pending prosecutions, most fully articulated subsequently in *Younger,* applies to the military justice system. The opinion of the unanimous Court, delivered by Mr. Justice Douglas, held that a district court should not sustain a writ of *habeas corpus* until the petitioner had exhausted his remedies within the military system, since civilian courts are required to respect the integrity of the military court system that Congress established (340 U.S. at 131–132):

> An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. * * * The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. * * * Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.



*Gusik*'s analogy between the necessity for exhaustion of remedies in the state and military justice systems is supported by a comparison of *Younger* and the present case.

Here, as in *Younger,* it is clear that Congress has manifested its desire that Article III courts not interfere with another system of justice. That desire is clearly expressed in the finality provision of the Uniform Code of Military Justice. Article 76 of the Code, 10 U.S.C. 876, provides that "the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter * * * are final and conclusive" and "all action taken pursuant to those proceedings are binding upon all * * * courts * * * of the United States."[10] As argued in

[10] That Article provides in full:

"The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-

the government's Supplemental Brief in *Secretary of the Navy* v. *Avrech*, No. 72–1713, on which we rely here, the legislative history of Article 76 shows that Congress intended to limit civilian court review of court-martial proceedings to petitions for *habeas corpus*.[11] Thus, both the House and Senate committee reports state this purpose clearly:

> Subject only to a petition for a writ of habeas corpus in Federal Court, [Article 76] provides for the finality of court-martial proceedings and judgments.

S. Rep. No. 486, 81st Cong., 1st Sess. 32; H. Rep. No. 491, 81st Cong., 1st Sess. 35.

In permitting *habeas corpus* as the sole exception to the finality of actions within the military court system, Congress recognized the special constitutional status of that writ under the Suspension Clause.[12] There is, of course, no corresponding constitutional basis for the pre-court-martial injunctive action here.

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martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President."

[11] We are serving a copy of our Supplemental Brief in *Avrech* upon counsel for DeChamplain.

[12] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." United States Constitution, Art. I, § 9, cl. 2.



The finality provision of Article 76 is appropriate in light of the comprehensive appellate procedures provided by the Uniform Code of Military Justice. See, *e.g.*, Articles 64–69, 10 U.S.C. 864–869. The ultimate responsibility for protecting the rights of accused servicemen (except for federal court review by writ of *habeas corpus*) has been placed in the Court of Military Appeals, a civilian judicial body with a specialized understanding of military problems. See *Noyd* v. *Bond*, 395 U.S. 683, 694. Subordinate to this court there are military appellate tribunals which insure that court-martial convictions of members of the Armed Forces will be thoroughly reviewed.

These provisions for appellate review show that Congress intended to create an extensive and independent judicial system for the administration of military justice. Federal court review was to be allowed only to the extent that the Constitution compelled the allowance of the writ of *habeas corpus* (see Supp. Brief in *Avrech*, pp. 7–9).

Since Congress intended to preclude civilian court review of court-martial convictions except in the limited situation where *habeas corpus* is available, *a fortiori* Congress intended to preclude review before a court-martial has even been completed.

Congress' policy was attributed by the *Younger* opinion to the basic doctrine of equity jurisprudence against restraint of criminal prosecutions and to the constitutional policy of federalism. The basic doctrine of equity jurisprudence is, of course, fully applicable here. The constitutional counterpart of federalism here is the power conferred upon Congress by Article

I, Section 8, clause 14 of the Constitution "To make Rules for the Government and Regulation of the land and naval Forces," which includes the power to establish a special system of military courts. *O'Callahan* v. *Parker*, 395 U.S. 258, 261.

It follows, therefore, that the district court's interference with DeChamplain's court-martial could be justified only if there were a threat of irreparable injury both great and immediate such as prosecution under a statute "patently and flagrantly unconstitutional on its face" or if there were "bad faith and harassment—official lawlessness—in [the] statute's enforcement." *Younger* v. *Harris*, *supra*, 401 U.S. at 56. If this condition is not met, then DeChamplain must exhaust his remedies within the military justice system. *Gusik* v. *Schilder*, *supra*. If he is convicted and that conviction is sustained, he may then seek relief in the federal civilian courts by a writ of *habeas corpus*.

The question to be answered, then, is whether the district court's rationale for interfering with the court-martial meets the *Younger* standards. We will show that it clearly does not.

3. Article 134, under which most of the charges against DeChamplain are laid is not "patently and flagrantly unconstitutional on its face." As we show at pp. 33–34, *infra*, he is charged under the third clause of the Article, an assimilative crimes statute as to which there is no constitutional doubt. The other aspect of the district court's preliminary injunction addresses the details of counsel's access to classified documents. There is no claim of the facial invalidity



of any statute and there is no finding that the restrictions on access imposed by the military constitute "bad faith and harassment" amounting to "official lawlessness." It follows, therefore, that the requirements of *Younger* have not been met and that the district court lacked authority to interfere with DeChamplain's court-martial.

It may, nevertheless, be useful to examine the rationale for intervention advanced by the district court.

4. The district court rested its power to interfere with the court-martial on two erroneous interpretations of the law. The court believed, incorrectly, that the general rule requiring a serviceman to exhaust his military remedies before seeking relief in an Article III court rests entirely upon the superior competence of military tribunals with respect to issues peculiar to military life. Thus, the court reasoned, it could intervene here because the "issues are purely legal" (J.S. App. 20). Secondly, the court decided that DeChamplain would suffer irreparable injury if his court-martial were allowed to go forward since "in the event plaintiff is convicted and is sentenced to a period of confinement, plaintiff will have served all or a good portion of any sentence in imprisonment prior to exhaustion of his appellate remedies in the military courts" (J.S. App. 27–28). Neither of these premises for intervention withstands analysis.

a. The requirement that a defendant exhaust his remedies before petitioning an Article III court rests, in the case of military courts as well as state courts, not primarily on any presumption of differing com-

petences but upon congressional intent, doctrines of equity, constitutional values, considerations of appropriate judicial tasks, comity, the avoidance of friction and of duplication of effort. These factors are found in this Court's decisions in *Younger* v. *Harris, supra,* and *Gusik* v. *Schilder, supra,* and in *Noyd* v. *Bond,* 395 U.S. 683.

It is true, as the district court noted (J.S. App. 18–19), that *Noyd* v. *Bond* referred to the undesirability of this Court's interpreting "extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence, and which have not even been fully explored by the Court of Military Appeals itself." 395 U.S. at 696. But that observation, if it can be taken to refer to superior competence in the Court of Military Appeals rather than a preference that lower courts explore complex issues of law before this Court is called upon to decide them, is certainly not the core rationale of *Noyd* v. *Bond*. This Court's argument in *Noyd, supra,* 395 U.S. at 693–698, rests upon most of the same factors cited in *Younger* and *Gusik* and urged here. Nothing in the opinion supports the theory that district courts may intervene in courts-martial when their competence appears equal to that of the military courts on particular issues.

Any such doctrine of selective intervention would have a calamitous impact upon the integrity of the military justice system. Cases would be tried piecemeal, partly in the military courts and partly in the civilian courts. In this case itself, the district court did not enjoin any court-martial for DeChamplain. It



instead enjoined that part of the trial that was to proceed under Article 134 and left the other charges standing, subject to resolution of the access problem. Now part but not all of the case is proceeding through the civilian courts while the rest remains with the military.

The impropriety of the district court's intervention is even more clearly shown by its assumption of the authority to supervise the disclosure of classified documents prior to the court-martial. The preliminary injunction requires full and unlimited access to all documents "relevant and material" to the case by DeChamplain, his civilian counsel and "such legal associates and assistants, subject to an appropriate protective order, as are necessary to said counsel's adequate preparation for trial" (J.S. App. 30). If that language means anything, it means the district court retains jurisdiction to determine, upon application of the plaintiff DeChamplain, (1) which documents are "relevant and material," (2) whether the terms of a protective order entered by the court-martial are "appropriate," and (3) whether disclosure to a particular associate or assistant is "necessary" for "adequate" trial preparation.

There could hardly be a more massive intrusion into a coordinate justice system than this. The district court has, in effect, taken from the military court the power to hear and to decide motions to dismiss charges and the power to supervise evidentiary disclosure.

Such an extraordinary intervention ought to be justified, as *Younger* v. *Harris* requires, by a showing of irreparable injury that is both "great and immediate." There is, however, no showing of any legally cognizable injury at all.

b. The proposition that DeChamplain, if convicted by court-martial, might serve all or a large part of his sentence before exhausting his military remedies, whatever its accuracy as a prediction, fails to state a legally cognizable injury. The non-intervention rule enunciated in *Younger* v. *Harris, supra,* and *Gusik* v. *Schilder, supra,* would be rendered meaningless if the prospect of confinement during appeal was an injury justifying federal court jurisdiction over state and military prosecutions.[13] As this Court said in *Younger, supra,* 401 U.S. at 49, the irreparable injury must be something more than "that incidental to every criminal proceeding brought lawfully and in good faith." Here nothing more was even alleged, much less shown.

5. Over and above the general principles barring the district court's jurisdiction, there is the additional barrier that there exists no specific authorization of jurisdiction for this case. The complaint cited 28

[13] The district court's conclusion that the prospect of confinement constitutes irreparable injury is difficult to reconcile with its refusal to release DeChamplain from confinement. Appellee has been confined pursuant to Article 10, U.C.M.J., 10 U.S.C. 810, since the date of his arrest (J.S. App. 23). The preliminary injunction did not affect his status, and subsequently, on May 6, 1974, the district court denied DeChamplain's motion for release pending appeal (App. 3). The court of appeals (App. 77) and the Court of Military Appeals, *DeChamplain* v. *Lovelace*, Misc. No. 74-28, decided April 17, 1974, have also refused to order DeChamplain's release pending trial.



U.S.C. 1331 and 1361 as granting jurisdiction. 28 U.S.C. 1331(a) requires that more than $10,000 be in controversy, which DeChamplain did not allege. This defect is fatal. See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 547; 1 Moore, *Federal Practice*, ¶ 0.92[1] (2d ed., 1974).

28 U.S.C. 1361 authorizes actions in the nature of mandamus. It did not enlarge the traditional scope of the mandamus power. See, *e.g., Leonhard* v. *Mitchell,* 473 F. 2d 709 (C.A. 2), certiorari denied, 412 U.S. 949; *Carter* v. *Seamans,* 411 F. 2d 767 (C.A. 5), certiorari denied, 397 U.S. 941. The present situation is not one of those "really extraordinary causes" for which mandamus is reserved. *Ex parte Fahey,* 332 U.S. 258, 260. "Mandamus, of course, may never be employed as a substitute for appeal * * *" (*Will* v. *United States,* 389 U.S. 90, 97), or be used to "thwart the congressional policy against piecemeal appeals" in criminal cases (*Parr* v. *United States,* 351 U.S. 513, 521). In addition, mandamus will not lie as the Air Force has not failed "to perform a duty owed to the plaintiff," as required for jurisdiction under 28 U.S.C. 1361. See *Spock* v. *David,* 469 F. 2d 1047, 1050 (C.A. 3).

It is clear, then, that, under the applicable law enunciated by this Court, the district court lacked the power to entertain DeChamplain's complaint.

### III. THE DISTRICT COURT ERRONEOUSLY DECIDED THE SUBSTANTIVE QUESTIONS IN THIS CASE

Point II above demonstrated that the district court erred in assuming jurisdiction over this action. We

now show that, even if the merits of the dispute had been properly before the district court, its decision on both substantive issues is erroneous. For this reason, too, the injunction issued below is improper.

### A. THE THIRD CLAUSE OF ARTICLE 134 IS NOT UNCONSTITUTIONALLY VAGUE

The district court enjoined DeChamplain's prosecution under any charges based upon Article 134 (J.S. App. 29–30) because it concluded that *Levy* v. *Parker*, 478 F. 2d 772 (C.A. 3), and *Avrech* v. *Secretary of the Navy*, 477 F. 2d 1237 (C.A.D.C.), established that Article 134 is unconstitutionally vague (J.S. App. 20–21). Had this rationale any validity, it would have been vitiated when this Court subsequently reversed the two decisions (*Parker* v. *Levy*, No. 73–206, June 19, 1974; *Secretary of the Navy* v. *Avrech*, No. 72–1713, July 8, 1974) and sustained the validity of Article 134.

But the district court's argument was fallacious in any event, since *Levy* and *Avrech* involved wholly different clauses of Article 134 from the one invoked against DeChamplain and there never has been any doubt of the constitutionality of the clause pertinent here. The Article prohibits (1) "all disorders and neglects to the prejudice of good order and discipline in the armed forces," (2) "all conduct of a nature to bring discredit upon the armed forces," and (3) "crimes and offenses not capital." The vagueness contentions in *Levy* (see slip op. 23) and *Avrech* (see slip op. 1) pertained only to the first and second clauses. As the Air Force Court of Military Review



held in reviewing DeChamplain's first conviction, he is being prosecuted only under the third clause of Article 134. *United States* v. *DeChamplain, supra*, 46 C.M.R. at 788. The dissenting members of this Court, who would have invalidated the first two clauses of Article 134, recognized that the third clause is an assimilative statute of a familiar type. (*Parker* v. *Levy, supra*, Stewart, J., dissenting, slip op. 1–2 n. 2):

> The clause in Art. 134 prohibiting "all crimes and offenses not capital" applies only to crimes and offenses proscribed by Congress. See Manual for Courts-Martial, United States ¶ 213(e) (1969). * * * Cf. *Grafton* v. *United States*, 206 U.S. 333. As such, this clause is simply assimilative, like 18 U.S.C. § 13 (1970), and is not the subject of the vagueness attack mounted by appellee on the balance of Art. 134. See generally Wiener, Are the General Military Articles Unconstitutionally Vague?, 54 A.B.A.J. 357, 358; Note, Taps for the Real Catch-22, 81 Yale L. J. 1518 n. 3.

As this statement indicates, the function of the third clause of Article 134—in contrast to the first two clauses—is merely to confer court-martial jurisdiction over service-connected noncapital federal offenses not otherwise individually specified in the Uniform Code of Military Justice. *United States* v. *Frantz*, 2 U.S.C.M.A. 161, 7 C.M.R. 37. Nor is the third clause unduly vague because these offenses are assimilated by reference rather than being set forth in full. In *United States* v. *Sharpnack*, 355 U.S. 286, 293, this Court sustained the Assimilative Crimes Act, 18 U.S.C. 13, holding: "Whether Congress sets forth

the assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as the state laws themselves." DeChamplain has not contended that the incorporated statutes that he is accused of violating—18 U.S.C. 793(b) and (d) and 50 U.S.C. 783(b)—are unduly vague. Accordingly, under *Sharpnack*, his contention that the third clause of Article 134 is unconstitutionally vague is plainly wrong.[14]

B. THE RESTRICTIONS IMPOSED BY THE AIR FORCE UPON DISCLOSURE OF CLASSIFIED DOCUMENTS ARE VALID

The district court's preliminary injunction also rests upon its conclusion that the restrictions regarding access to and use of the classified materials in issue preclude a fair trial (J.S. App. 21–22). We argued above (pp. 27–31) that the district court erred in assuming jurisdiction to review this issue and that its decree, which envisions continuing supervision over the court-martial discovery proceedings, is an unwarranted interference with the military judicial system. We now show that the court below also erred on the merits in concluding that the restrictions preclude a fair trial.

[14] DeChamplain's motion to dismiss did not challenge any of these arguments. Instead, he contended that he is "in serious jeopardy of conviction pursuant to the first two clauses of that Article" (Motion to Dismiss, p. 5). As shown in our brief opposing that motion (pp. 2–3), that argument was factually incorrect, but in any event, it could not support the district court's injunction, which bars a court-martial under all three clauses of Article 134. Further, DeChamplain's argument is based upon the premise that the first two clauses are unconstitutional. The *Levy* and *Avrech* decisions thus dispose of the argument entirely.



No evidence is being withheld from DeChamplain or his civilian and military counsel. The restrictions regarding use of the classified materials are a reasonable accommodation of the accused's interests and the military's legitimate interest in preventing widespread dissemination of such sensitive materials.[15] In addition, after the district court's opinion was rendered, the Air Force amended its restrictions to enable a foreign-policy expert and an authority on military classification of documents selected by DeChamplain to have access to the classified materials (J.S. App. 32–33). This amendment obviates one of DeChamplain's principal challenges to the original restrictions (J.S. App. 17, n. 2).

Fifteen classified documents, however, have not been disclosed to DeChamplain's civilian defense team (J.S. App. 22). Although these documents were introduced as evidence at DeChamplain's first court-martial, the Air Force decided not to rely upon them in the second court-martial (see Statement, *supra*, pp. 6–7). DeChamplain and his two military counsel have had access to these materials, however, inasmuch

[15] The United States Court of Military Appeals has specifically recognized the conflict faced by the government in maintaining the prosecution of criminal offenses when disclosure of the substance of classified documents is essential to its case. In *United States* v. *Gagnon*, 21 U.S.C.M.A. 158, 44 C.M.R. 212, the court set out the options available to the government when faced with this dilemma in the following language: "* * * the officers concerned with operations must choose between (1) foregoing prosecution, (2) not using the classified information in any way, or (3) devising a system under which the information can be used at a trial." 21 U.S.C.M.A. at 165; 44 C.M.R. at 219.

as they are part of the record of the first trial (J.S. App. 22, n. 7; App. 56–58).

The district court's injunction requires that before DeChamplain is prosecuted on any charge whatever, the entire record of the first court-martial must be delivered to his civilian counsel (J.S. App. 30). There is no basis for the district court's requiring the confidentiality of the fifteen documents to be thus compromised when all charges involving those documents have been dropped and they will not be introduced as evidence. Although DeChamplain's chief military counsel represented generally that "a full and adequate understanding of the case and the possible theories of defense" required access to these fifteen documents as well as those on which the present charges are based (App. 56–57), he set forth no specific support for this conclusion, and none is readily apparent. Indeed, the district court's opinion states at one point, "The issue of access to documents, therefore, relates only to those upon which the Air Force is basing their case" (J.S. App. 16, n. 1). The injunction requiring delivery of the fifteen classified documents no longer a part of the case is thus unsupported and unwarranted.

Finally, the district court did not in any event, apply the proper standard of review. In *United States* v. *Augenblick*, 393 U.S. 348, this Court rejected the claim of a serviceman—who, unlike DeChamplain, had exhausted all military remedies—that his court-martial conviction was constitutionally defective because he had been denied access to potential evidence in the prosecutor's possession. *Augenblick* held that "apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten * * * that the proceeding is more a spectacle * * * or trial by ordeal * * * than a disciplined contest." 393 U.S. at 356. By this standard, there is no basis for concluding that the restrictions imposed upon DeChamplain's use of the classified material would deny him a fair trial. Accordingly, the district court erred not only in exercising jurisdiction to review the restrictions upon disclosure of classified documents, but also in concluding that those restrictions are invalid.



## CONCLUSION

For the foregoing reasons, the decision below should be reversed and the preliminary injunction should be vacated.

Respectfully submmitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1346

JOHN L. McLUCAS, Secretary of the Air Force, *et al.*,

*Appellants,*

v.

RAYMOND G. DeCHAMPLAIN,

*Appellee.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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No. 73-1346

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JOHN L. McLUCAS, Secretary of the Air Force, *et al.*,

*Appellants,*

v.

RAYMOND G. DeCHAMPLAIN,

*Appellee.*

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## BRIEF FOR APPELLEE

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## QUESTIONS PRESENTED

1. Does this Court have jurisdiction over a direct appeal from a decision by a single district judge enjoining the enforcement of an Act of Congress, where the district judge proceeded on the basis of a then-controlling but since reversed decision of the Court of Appeals?

2. Does a United States District Court have jurisdiction to review collaterally, other than by *habeas*

*corpus*, determinations of constitutional law and individual rights made by a military court-martial?

3. May a United States District Court enjoin a pending court-martial where clear and substantial violations of a serviceman's constitutional rights will occur if the court-martial is allowed to take place, no material facts are in dispute, no interpretation of specialized military law is necessary, and there is little likelihood that the rights asserted can be vindicated in military courts?

4. Did the district court act within its discretion in enjoining the appellee's scheduled court-martial until he and his chief defense counsel are given full access to the evidence upon which the charges are based?

5. In a criminal prosecution brought pursuant to 18 U.S.C. §793, must the government provide the defendant and his chief defense counsel with unlimited access to and use of relevant evidence, subject to a protective order against disclosure to those not involved in the defense of the case?

## STATEMENT OF THE CASE

DeChamplain brought this action to enjoin the defendants from subjecting him to a court-martial under conditions imposing unmistakable and unconscionable interferences with his Fifth and Sixth Amendment rights to due process of law, a fair trial, and the effective assistance of counsel. The jurisdiction of the federal courts was invoked prior to trial because the violations of DeChamplain's constitutional rights were



clear and substantial; because the military courts denied relief and indicated that they would continue to do so; because no material facts were in dispute and the issues were of pure constitutional law; and because DeChamplain would suffer permanent and irreparable harm if he were required to submit to the court-martial and exhaust all appeals within the military justice system before gaining a federal civilian court forum to redeem his rights.

## FACTS[1]

DeChamplain is a Master Sergeant in the United States Air Force. He served in the Air Force for over twenty years with an officially recorded outstanding record of service. His enlistment expired on June 10, 1973. Since that date he has been retained in the service on non-pay status pending final determination of the charges against him.

DeChamplain was arrested by the Air Force on July 2, 1971, and has been kept in confinement ever since that date. In November, 1971, he was tried by general court-martial and convicted on charges alleging three offenses: (1) Violating Article 81 of the Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. §881, by conspiring to communicate classified information to an agent of a foreign government, in violation of Article 134, U.C.M.J., 10 U.S.C. §934, and 50 U.S.C. App.

[1]The Court is respectfully referred to the district court's findings of facts, reprinted in the Jurisdictional Statement (J.S.) at 23-28.

§ 783(b)[2]; (2) violating Article 92, U.C.M.J., 10 U.S.C. § 892, by failing to obey an Air Force regulation; and (3) violating Article 134 by allegedly copying and attempting to deliver classified documents affecting national defense to unauthorized persons, in violation of the espionage laws of the United States, 18 U.S.C. § 793.

The conviction was reversed by the Air Force Court of Military Review on October 5, 1972, on the ground that it was based upon a coerced and unlawful confession. *United States v. DeChamplain*, ACM 21034, 46 C.M.R. 784. The government appealed to the Court of Military Appeals, which affirmed on February 16, 1973, 22 U.S.C.M.A. 150, 46 C.M.R. 150.

Over three months later, on May 30, 1973, the same charges, with certain minor modifications to reflect the suppression of the coerced statement, were approved for a rehearing by a general court-martial (App. 8, 20-22).[3]

On July 5, 1973, DeChamplain retained Leonard B. Boudin as chief defense counsel because of his experience and expertise in similar litigation involving charges of violations of the espionage laws (App. 10, 36). On the following day and repeatedly thereafter, DeChamplain requested, through counsel, that the entire record of the prior trial and the charges and documents upon which the prosecution was based be

[2] The third clause of Article 134 assimilates into the Code all federal civilian crimes committed by a serviceman, subject to the "service-connected" limitations of *O'Callahan v. Parker*, 395 U.S. 258.

[3] References to "App. " are to pages in the Appendix.



delivered to chief defense counsel for examination, study, and preparation for trial (App. 10). It was contemplated that counsel would study the documents together with his partners and associates and with expert consultants, some of whom would be witnesses for the defense at trial (App. 36-39, 56-58).

The government refused to make any of the "classified" portions of the prior trial record or the documents available to DeChamplain's civilian counsel from July to September 1973, and stated that counsel would have to be "cleared" by the Air Force and by other agencies of the federal government. Appellee sought relief from the military judge, Colonel Russell A. Stanley, who refused to order that the documents or prior record be disclosed at that time (App. 11, 56). Appellee then petitioned the Court of Military Appeals, which also denied relief on September 5, 1973. *Dechamplain v. McLucas*, 22 U.S.C.M.A. 462, 47 C.M.R. 552.

On September 20, the government announced a final decision on access. Chief defense counsel would be absolutely barred from access to fifteen documents which had been introduced at DeChamplain's first court-martial, as well as all references to those documents in the record of that trial. The government sought to avoid the defense's objections by unilaterally dropping the specifications relating to the fifteen documents. (App. 11, 20-22, 25-27).[4]

Chief defense counsel also was not to be permitted to receive copies of the nine documents (or the

[4] The revised charge sheet shows the dropped specifications, which the government crossed out by hand (App. 20-22).

references to them in the prior record of trial) upon which the remaining outstanding charges were based. He was to be allowed, however, to look at the documents under severe restrictions. He could examine the documents and discuss their contents only in the presence of officials holding appropriate security clearances, and only at a time and place chosen by the government. He would not be entitled to retain notes with respect to classified matters from such documents for use in his office in preparation for trial, but would have to surrender such notes to be "secured" by the government. Moreover, he would have to submit *all* his notes to government personnel for decision as to whether or not they relate to classified material and must be "secured."

No other members of the civilian defense team, including associate attorneys, expert consultants, and potential expert witnesses could observe the documents or even receive second-hand information about their contents, with the exception of one associate attorney and one legal secretary. Finally, chief counsel could not discuss any aspects of the documents with that associate or with military counsel in his office or home; he could only discuss such information in a designated government office and then only with individuals with the proper security clearances.[5] Nor could DeChamplain retain his classified notes for delivery to his civilian

[5]Subsequent to the district court's decision herein, the government amended its restrictions to allow limited access to one foreign policy and one classification expert (J.S. at 32-33). These two experts were subject to the same restrictions as to right to retain documents, to take notes from them, or even to discuss their contents with defense counsel.



counsel or otherwise make written reference to the classified exhibits or to other relevant sections of the record (App. 11, 25-27).

The military judge approved the terms of the government's restrictions upon access without modification by order dated October 13, 1973 (App. 62).

DeChamplain also raised several other issues before the military judge in pre-trial sessions, pursuant to Article 39, U.C.M.J., 10 U.S.C. §839. Among these were motions (1) to dismiss the Article 81 and Article 134 charges on the grounds that Article 134 had been declared unconstitutional by the Courts of Appeals for the Third and District of Columbia Circuits;[6] (2) to require an open and public trial, contrary to the practice at DeChampain's first court-martial, where the trial had been closed when "classified" information was introduced or discussed; and (3) to allow DeChamplain's military counsel to appear in federal court, if necessary, to seek appropriate relief. These motions were denied (App. 9, 14, 16). The petition to the Court of Military Appeals for extraordinary relief also raised these issues; the Court denied relief with respect to them as well. *DeChamplain v. McLucas, supra.*

DeChamplain's court-martial was scheduled to begin on November 15, 1973.

**Proceedings Below:**

DeChamplain brought suit in the United States District Court for the District of Columbia. He sought

[6]The Article 81 charge alleged a conspiracy to violate Article 134.

an injunction on four causes of action: (1) prohibiting the court-martial from going forward until he and his chosen counsel were granted unlimited access to the documents and the record of the prior trial, subject only to a protective order against disclosure to third parties not involved in the defense of the case; (2) prohibiting trial on the Article 134 charges; (3) enjoining the military court from closing the trial to the public and the press; and (4) requiring the government to permit DeChamplain's military defense counsel to appear in federal court in defense of their client.

Relief on the Article 134 question was sought on the basis of the then-controlling decisions of the United States Court of Appeals for the District of Columbia holding Article 134 to be unconstitutional, *Avrech v. Sec'y. of the Navy*, 477 F.2d 1237 (1973); *Hooper v. Laird*, 482 F.2d 784 (1973), and upon the similar decision of the Third Circuit Court of Appeals in *Levy v. Parker*, 478 F.2d 772 (1973).[7] Accordingly, a three-judge court was not requested because the question of Article 134's constitutionality did not seem to be "substantial," at least to the district court which was bound by the holdings of the court of appeals.

The district court granted relief on the "access" and "Article 134" causes of action; it did not reach the "public trial" and "military counsel" questions. It held that the access limitations would "effectively handcuff . . . retained civilian counsel" and that "[t]he Air Force has not come forward with any convincing

[7]This Court subsequently reversed the decisions in *Avrech* and *Levy*. *Secretary of the Navy v. Avrech*, ____ U.S. ____, 94 S.Ct. 3039 (1974); *Parker v. Levy*, ____ U.S. ____, 94 S.Ct. 2547 (1974).



justification, military or otherwise, for the imposition of these limitations" (J.S. at 22). It found that it should not abstain from deciding the issues prior to trial because:

> "The circumstances surrounding this case are such that unless this Court takes affirmative action, Sergeant DeChamplain will be denied fundamental constitutional guarantees.
>
> The matters raised in this litigation do not necessitate determinations which the military forum is best equipped to make. The issues are purely legal: whether the military has jurisdiction to try plaintiff for violations of a statute which stands unconstitutional under circumstances and conditions which may unduly impede his preparation and presentation of a sound defense. No compelling justifications have been presented which require this Court to defer considerations of these matters to the military " (J.S. at 19-20).

The government appealed directly to this Court, pursuant to 28 U.S.C. §1252, and, as a protective measure, to the United States Court of Appeals for the District of Columbia Circuit (App. 75). The Court of Appeals extended the government's time to docket the appeal until 15 days after the date of this Court's final decision in this matter (App. 76-77).

Appellee moved to dismiss the appeal in this Court on the grounds that the Court does not have appellate jurisdiction over an order issued by a single district judge enjoining the enforcement of an Act of Congress. On June 24, 1974, the Court postponed further consideration of the question of its jurisdiction to the hearing of the case on the merits (App. 78).

At the end of its last Term, the Court held that Article 134 is constitutional, reversing the decisions of the Third Circuit and District of Columbia Courts of Appeals. *Parker v. Levy, supra; Secretary of the Navy v. Avrech, supra.* Accordingly, appellee concedes that that part of the district court's order enjoining prosecution on the Article 134 charges was in error. We therefore do not address the Article 134 question in this Brief, except in dealing with the question of the Court's jurisdiction over the appeal (Point I, *infra*).

## SUMMARY OF ARGUMENT

### I.

The Court lacks jurisdiction over the appeal because the single district judge did not have jurisdiction to enter an order restraining the enforcement of Article 134, U.C.M.J., 10 U.S.C. §934, an Act of Congress. Rather, the district judge should have convened a three-judge court to hear and decide that issue. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713. It has long been the rule that this Court may not review injunctions entered by a single judge that required the consideration of a three-judge court. *Stratton v. St. Louis Southwestern Ry. Co.*, 282 U.S. 10. The government's remedy is to the Court of Appeals. *Hicks v. Pleasure House, Inc.*, 404 U.S. 1.

The single district judge properly did not refer the "access to evidence" cause of action to a three-judge court, however, since it did not involve an Act of Congress. For this very reason, the Court does not have



direct appellate jurisdiction over that issue. Again, the government must appeal to the Court of Appeals.

### II.

A federal district court has jurisdiction to exercise collateral review other than by habeas corpus over determinations of constitutional law affecting individual rights made by a military court. If this were not so, many servicemen convicted by courts-martial would never be able to raise their constitutional claims and defenses in a federal court; this would violate the strong policy in favor of judicial review. *Fay v. Noia*, 372 U.S. 391, 424.

Moreover, there is a long history in this Court supporting various forms of collateral attack upon court-martial determinations. *Gusik v. Schilder*, 340 U.S. 128, 133 n.3. And Congress, in enacting Article 76 of the Uniform Code and its immediate predecessors in the Articles of War, did not intend to change the historical practice with respect to collateral review. Rather, Congress intended only to make explicit the termination point for judicial proceedings within the military itself.

Finally, if Article 76 were interpreted to bar collateral review other than by habeas corpus, it would unconstitutionally deprive many servicemen of due process of law and of the right to present their constitutional defenses to an Article III court. *Crowell v. Benson*, 285 U.S. 22; *St. Joseph Stock Yards v. United States*, 298 U.S. 38.

## III.

A federal district court may enjoin a court-martial when the military acts to deprive the accused of substantial constitutional rights going to the integrity of the trial process itself, where there is little likelihood that the rights asserted will be favorably viewed by the military courts, where no relevant facts are disputed, and where interpretation of specialized military law is not necessary.

There is no rigid rule against such equitable intervention. No statute or constitutional provision prohibits it. And the comity doctrine, which limits but does not prohibit federal court interference with state criminal trials, does not apply to military trials with equal force. There is a revered historical and judicial tradition of deference to the "independent sovereignties" of the states; the tradition with respect to the military is quite the opposite. *Reid v. Covert*, 354 U.S. 1; *O'Callahan v. Parker*, 395 U.S. 258. Moreover, state courts have a long common-law experience, deal with the full range of judicial problems, and are primarily charged with the protection of constitutional rights. The primary purpose of the military, on the other hand, is to prepare for and to fight wars; military courts have shown less solicitude than civil courts for the niceties of constitutional law and individual rights. Thus, there is much less reason for federal courts to abstain from interference with court-martial proceedings. Where the violations of constitutional rights are clear and fundamental, a federal court may intervene.



## IV.

Here the district court acted well within the limits of its discretionary power in issuing a preliminary injunction on the "access to evidence" cause of action, even if those limits are measured by the strict comity doctrine urged by the government. The question involved was one of pure constitutional law affecting the legitimacy of the trial process itself. There were no disputed material facts nor were there problems of interpretation and application of specialized military law. There was a strong likelihood that the constitutional issues would not receive favorable consideration in the military; indeed, appellee had raised the issues unsuccessfully before the military courts, including the Court of Military Appeals. And, there was little question that, on the merits, appellee was correct in his constitutional claim.

Finally, there was a strong probability of irreparable harm if the district court did not intervene when it did DeChamplain had been in confinement for over two years. He had undergone one trial which was tainted by government misconduct. If he had been forced to go to trial under the conditions the government sought to impose, his chances of acquittal would have been minimal. He would have had to wait until he exhausted his military remedies and sought habeas corpus, if available, in a federal court before his constitutional rights would have been vindicated, during which time he would have remained in confinement. And, finally, he then would have had to undergo a *third* court-martial at which he would be afforded the rights to which he was entitled. Thus, it can in no sense be

said that DeChamplain could protect his rights through the normal course of a "single criminal prosecution." *Cf., Younger v. Harris*, 401 U.S. 37, 46.

## V.

The government must disclose all relevant evidence to a criminal defendant and his attorneys or it must forego prosecution. This is so even where the evidence involves so-called "state secrets" or "national security" information. The government, of course, ordinarily may protect its secrets in the legitimate exercise of its power to protect the national defense and provide for the common welfare. But once the government invokes the jurisdiction of the courts for the purpose of imposing criminal sanctions, it no longer may withhold those secrets if they constitute relevant evidence to the defense of the charges. *United States v. Reynolds*, 345 U.S. 1, 12; *Alderman v. United States*, 394 U.S. 165, 181.

Here, the documents at issue are more than merely "relevant" evidence; they are the very basis and foundation of the prosecution itself. And under the espionage charges brought, the defendant has the right to present defenses that the documents do not affect the defense or security interests of the United States, or that they were in the "public domain" prior to the defendant's alleged acts of disclosure to unauthorized agents. *Gorin v. United States*, 312 U.S. 19; *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945). Thus, defendants charged with espionage must be given the opportunity to examine closely the information al-



legedly wrongly disclosed so that all avenues of proper defense may be investigated and pursued; this is the universal practice in federal court espionage cases. The restrictions imposed upon DeChamplain and his chief counsel effectively denied the opportunity to present these defenses and denied DeChamplain's right to be represented by counsel of his choice. They fundamentally affected the integrity of the entire trial process: under the circumstances a fair trial in accordance with due process of law was impossible.

## ARGUMENT

### POINT I.

### THE APPEAL SHOULD BE DISMISSED FOR LACK OF APPELLATE JURISDICTION

This appeal arises in an unusual context presenting difficult problems as to the appellate jurisdiction of this Court. We have been unable to find a single case in which similar problems were presented.

The complaint herein sought an injunction against the enforcement of Article 134, U.C.M.J., an Act of Congress. Ordinarily, a prayer for such relief cannot be considered by a single district judge but must be referred to a three-judge court, 28 U.S.C. §2282; the only exception is where the constitutional question raised is insubstantial. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713. At the time the complaint was filed, however, it was the settled law

within the District of Columbia Circuit that Article 134 was unconstitutional. *Avrech v. Secretary of the Navy*, 477 F.2d 1237 (D.C. Cir. 1973); *Hooper v. Laird*, 482 F.2d 784 (D.C. Cir. 1973). The District Court for the District of Columbia, whether constituted as a single-judge court or as a three-judge court, clearly was bound by those decisions at that time. It therefore did not seem necessary to convene a three-judge court on the Article 134 question.[8]

After the government appealed to this Court and appellee had moved to dismiss, the Court reversed the decisions of the Third Circuit and District of Columbia Court of Appeals and held that Article 134 was constitutional. *Parker v. Levy*, ____ U.S. ____, 94 S.Ct. 2547 (1974); *Secretary of the Navy v. Avrech*, ____ U.S. ____, 94 S.Ct. 3039 (1974). Those decisions suggest that the single district judge here did not have jurisdiction to enter an injunction against the enforcement of Article 134 because the question of the statute's constitutionality was indeed substantial and a three-judge court was required.[9]

[8]It was not necessary to convene a three-judge court on the access-to-documents or other issues because they did not involve an Act of Congress. This was so even if a three-judge court was required on the Article 134 question. See Motion to Dismiss at 7-8.

[9]The government argues that even if the question of the constitutionality *vel non* of the first two clauses of Article 134 was substantial, the question raised here was not substantial because DeChamplain was charged pursuant to the third clause of that Article (Govt. Brief at 18-19). But we have shown that there is at least a substantial question whether Article 134 is divisible into three separate statutes, and, in any event, that a serviceman charged under the third clause is subject to conviction under either of the first two clauses. See Motion to Dismiss at 3-5.



Accordingly, this Court may not review on direct appeal the injunction erroneously entered by the single district judge on the Article 134 issue. *Stratton v. St. Louis Southwestern Ry. Co.*, 282 U.S. 10, 15-16; *Hicks v. Pleasure House, Inc.*, 404 U.S. 1, 3. See Motion to Dismiss at 5-8. Rather, the government must seek relief in the Court of Appeals, which assuredly would vacate that part of the district court's order enjoining enforcement of Article 134. *Idlewild Bon Voyage Liquor Corp. v. Epstein; supra; Hicks v. Pleasure House, Inc., supra; Schackman v. Arnebergh*, 387 U.S. 427; *Buchanan v. Rhodes*, 385 U.S. 3; Wright, *Law of Federal Courts* (2d Ed. 1970) § 59, p.193.[10] The Court of Appeals could then consider *on its merits* the second branch of the district court's order dealing with access to documents and evidence,[11] over which it would have

[10]The government misstates the law in arguing that the proper remedy is for this Court to vacate and remand (Govt. Brief at 17, n.9). That remedy once was proper because there was no remedy in the Court of Appeals. *Stratton v. Southwestern Ry. Co., supra*, 282 U.S. at 16. The *Idlewild* case and its progeny, cited in the text above, changed the rule so as to provide a remedy in the Courts of Appeals and thereby make unnecessary and unavailable any relief in this Court. The government's reliance on *Flemming v. Nestor*, 363 U.S. 603, 607, and *Federal Housing Administration v. The Darlington*, 352 U.S. 977, is misplaced. Those cases merely reflect the old *Stratton* rule; they were decided well before *Idlewild* and the cases it spawned abandoned that rule.

[11]The single district judge exercised proper jurisdiction over the "access" cause of action irrespective of its jurisdiction *vel non* over the Article 134 cause of action because it was an independent claim not relating to the validity or interpretations of Article 134 or any other Act of Congress. *Landry v. Daley*, 280 F.Supp. 929, 937-938 (N.D.Ill. 1967), 288 F.Supp. 194, 197-199 (N.D.Ill. 1968); *Hobson v. Hansen*, 256 F.Supp. 18 (D.D.C. 1966);

the usual appellate jurisdiction pursuant to 28 U.S.C. §1292.[12]

The government argues that a three-judge court was not required because an injunction against the enforcement of Article 134 was sought only for this case, and not to restrain the operation of the "entire regulatory scheme," citing *Flemming v. Nestor*, 363 U.S. 603 and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154 (Govt. Brief at 17-18). But 28 U.S.C. § 2282 mandates a three-judge court whenever an application is made to restrain "the enforcement, operation, *or* execution of any Act of Congress for repugnance to the Constitution of the United States;" clearly an order enjoining the appellee's court-martial on the grounds that Article 134 was unconstitutional comes within the statute's scope. The citations to the *Flemming* and *Kennedy* cases are inapposite; in those cases only declaratory judgments were sought, and the Court expressly relied on the important differences between a declaratory judgment and an injunction. See *Kennedy v. Mendoza-Martinez*,

*Jehovah's Witnesses in State of Wash. v. King County Hosp.*, 278 F.Supp. 488, 496-497 n.6 (W.D.Wash. 1967), aff'd. 390 U.S. 598 (1968); *ABC Books, Inc. v. Benson*, 315 F.Supp. 695, 703 (M.D.Tenn. 1970); *Ascheim v. Quinlan*, 314 F.Supp. 685 (M.D.Pa. 1970); *Tillman v. Dade County School Board*, 327 F.Supp. 927, 930 (S.D.Fla. 1971); Wright, *Law of Federal Courts*, *supra* at 191. Indeed, a three-judge court probably would lack jurisdiction to decide such joined claims. See *Pittsburgh & W.V. Ry. Co. v. United States*, 281 U.S. 479, 488 (1930); *New York Central Sec. Corp. v. United States*, 287 U.S. 12 (1932); *Powell v. United States*, 300 U.S. 276, 289-290 (1937); Wright, *Law of Federal Courts*, *supra* at 191.

[12]There is of course no provision for a direct appeal to this Court of the district court's order on the access question, standing alone.



*supra*, 372 U.S. at 152-155; *Flemming v. Nestor*, *supra*, 363 U.S. at 607.[13]

The position urged here by the government would render §§2282 and 2281 inapplicable in every case where an injunction is sought or obtained except where relief is sought in the nature of a broad class action. That view is contrary to the history and intent of the three-judge court statutes. Indeed, the Court recently reaffirmed that "A three-judge court is required even if the constitutional attack – as here – is upon the statute *as applied*." *Steffel v. Thompson*, 415 U.S. 452, 457 n.7 (emphasis added).[14] That rule is dispositive here, where an injunction was sought on the basis that the statute was unconstitutional on its face and as applied.

The government's further argument that a three-judge court was not required because the single judge could and should have dismissed the case on the "threshold" question of whether the district court should enjoin a pending court-martial, *Younger v. Harris*, 401 U.S. 37 (Govt. Brief at 12), is also precluded by *Steffel*. There the Court noted that a three-judge court "is normally required even if the decision is to dismiss under *Younger-Samuels* principles, since an exercise of dis-

[13]Compare *Rusk v. Cort*, 372 U.S. 144, decided together with *Kennedy v. Mendoza-Martinez*, *supra*, where an injunction was sought and a three-judge court was convened. 372 U.S. at 152. See *Cort v. Herter*, 187 F.Supp. 683 (D.D.C. 1960).

[14]See also *Department of Employment v. United States*, 385 U.S. 355, 357; *Query v. United States*; 316 U.S. 486, 490; Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 37-50 (1964).

cretion will usually be necessary." 415 U.S. at 457, n.7.[15]

Finally, the government seems to suggest that the Court may review the district court order under 28 U.S.C. §1252 even though it is barred from review under 28 U.S.C. §1253 (Govt. Brief at 16). But this position would allow direct appeal to this Court by the government whenever an injunction is granted by a single judge acting without jurisdiction. That would be in clear derogation of the holding of this Court that:

> "If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court . . . ." *Stratton v. St. Louis S.W. Ry. Co., supra*, 282 U.S. at 15-16.

Read in this light, the clear meaning of section 1252 is that appeal lies directly to the Supreme Court from a district court order entered *within* its jurisdiction;[16] when the district court acts without jurisdiction, appeal is properly taken only to the Court of Appeals.

When viewed from a broader perspective, the course of action urged here makes good sense. The only possible reason for bringing this case directly to the Court is that the district court enjoined the enforcement of Article 134. But in the light of the Court's decisions in *Parker v. Levy, supra*, and *Secretary of the Navy v. Avrech, supra*, appellee concedes that that portion of the district court's decision is in error. Accordingly, there is no need for the Court to exercise the extraordinary procedure of direct review of the district court's decision. The Court of Appeals can expeditiously correct the district court's error *vis-a-vis* Article 134. It can then consider the remaining issues raised by the government's appeal in normal course.

On the other hand, if the Court does not believe that the opinion of the District of Columbia Circuit Court of Appeals would be helpful in its ultimate determination of the case, then in the interests of judicial economy, it should treat the government's appeal as a petition for certiorari, grant certiorari, and decide the case on the merits.

[15] See also *Jones v. Wade*, 479 F.2d 1176, 1180 (5th Cir. 1973); *Abele v. Markle*, 452 F.2d 1121, 1125 (2nd Cir. 1971); Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 Harv. L. Rev. 299, 309 (1963).

[16] *E.g.*, declaring an Act of Congress to be unconstitutional without enjoining its enforcement. See *Kennedy v. Mendoza-Martinez, supra*.



## POINT II.

### A UNITED STATES DISTRICT COURT HAS JURISDICTION TO REVIEW COLLATERALLY, OTHER THAN BY HABEAS CORPUS, DETERMINATIONS BY A MILITARY COURT-MARTIAL OF CONSTITUTIONAL LAW AND INDIVIDUAL RIGHTS.

DeChamplain invoked the jurisdiction of the district court pursuant to 28 U.S.C. §1331 – the federal question statute.[17] He raised substantial questions

[17] Section 1331(a) provides that:

> "the district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

involving Fifth and Sixth Amendment rights to due process, a fair trial, and effective assistance of counsel. Accordingly, the district court had jurisdiction to entertain the action unless some other statute created an exception to section 1331 and barred jurisdiction.[18]

[18]The government argues here, for the first time, that there is no federal question jurisdiction because DeChamplain did not allege the jurisdictional amount in his complaint (Govt. Brief at 30-31). But DeChamplain alleged that the case "arises under the Fifth and Sixth Amendments to the Constitution . . . [and that t]he Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1361, 2201 and 2202 . . . ." By alleging § 1331 jurisdiction, DeChamplain, of course, alleged by necessary implication all the requisites of that jurisdiction; the form used is consistent with the injunction of Rule 8(e)(1), Federal Rules of Civil Procedure that "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required." Indeed, the government's attempt to raise the pleading issue at this time is cynical at best. Surely, had the issue been raised in the district court and had that court considered the pleading as to jurisdiction to be defective, an amendment in due course would have been permitted under Rule 15 of the Federal Rules of Civil Procedure. See also F.R. Civ. P. 8f ("All pleadings shall be so construed as to do substantial justice"). Indeed, amendment to correct technical defects in allegations of jurisdiction is specifically provided for, both in the trial and the appellate courts. 28 U.S.C. §1653. Accordingly, even if the Court finds that the allegation of §1331 jurisdiction in the complaint was not complete, it should deem the complaint amended under §1653 to correct the defect. See, *e.g.*, *Willingham v. Morgan*, 395 U.S. 402, 407 n.3; *Buell v. Sears, Roebuck and Co.*, 321 F.2d 468, 471 (10th Cir. 1963); *Firemen's Ins. Co. v. Robbins Coal Co.*, 288 F.2d 349 (5th Cir. 1961), *cert. den.* 368 U.S. 875; *Fry v. Layne-Western Co.*, 282 F.2d 97, 99 (8th Cir. 1960).

As a factual matter, there can be no doubt that the amount in controversy is greatly in excess of $10,000.00 in value, exclusive of interest and costs. See *Schroth v. Warner*, 353 F.Supp. 1032, 1036 and n.9 (D. Hawaii 1973). At his first court-martial, DeChamplain



The government argues that Article 76, U.C.M.J., 10 U.S.C. §876,[19] creates just such an exception, and that

was sentenced to fifteen years at hard labor, dishonorable discharge, lost of accrued pay and allowances, and reduction to the lowest enlisted grade; he faced a similar sentence at a second court-martial. The loss of liberty for fifteen years is of itself worth well over the jurisdictional amount in value. Moreover, during such a period of incarceration DeChamplain would not be free to earn a livelihood, either in the military or as a civilian. As a Master Sergeant, DeChamplain qualifies at the E-7 pay grade. With over twenty years of military experience, he was paid at the rate of $652.80 per month at the time of his arrest; at the time of the district court's action in this case he qualified for pay at the rate of $792.90 per month. See Executive Order No. 11638 (Dec. 22, 1971), 36 F.R. 24913 and Executive Order No. 11740 (Oct. 3, 1973), 38 F.R. 27585. With normal increases for seniority and upward adjustments in accordance with the general schedule of compensation for federal classified employees, pursuant to Section 8 of Pub. L. 90-207, 81 Stat. 654 (1967), DeChamplain would receive, at a minimum, over $150,000 in basic pay alone for his next fifteen years of Air Force service. He would not receive any part of that sum, of course, if he were convicted on the pending charges.

If, on the other hand, DeChamplain were to choose to retire from the military, he not only would be free (but for possible conviction on the pending charges) to seek civilian employment, but he would be entitled to a lifetime pension at fifty percent of the rate of the baisc pay applicable on the date of his retirement, or nearly $400 per month for the rest of his life. See 10 U.S.C. §§8914, 8991(B). These retirement rights, too, would be lost by a conviction on the pending charges.

Finally, if convicted, DeChamplain would lose accrued pay from the date of the expiration of his enlistment (June 10, 1973) until the date of his conviction and final approval of his sentence. At the present time this would amount to at least seventeen months pay, worth, at the present rate of compensation, $13,479.30.

[19]Article 76 provides:

"The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-

exhausted his military remedies.[21] A holding that habeas corpus is the only method by which a serviceman may secure judicial review would mean, in effect, that most servicemen would never be able to obtain review in a federal court of their convictions or of the constitutional issues which may be raised by the record. Such a holding would "defeat the manifest federal policy that federal constitutional rights of personal liberty[22] shall not be denied without the fullest opportunity for plenary federal judicial review." *Fay v. Noia*, 372 U.S. 391, 424. *Cf., Sibron v. New*

[21]For example, in *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969), *cert. den.* 396 U.S. 1013, it took two years for the serviceman to exhaust his military remedies, by which time he was no longer in confinement. In *Secretary of the Navy v. Avrech, supra*, the serviceman was not sentenced to any confinement but nevertheless suffered the ususal "adverse collateral legal consequences" which flow from a criminal conviction. *Cf., Sibron v. New York*, 392 U.S. 40 at 55. Indeed, in the instant case, DeChamplain already has been confined for over three years, both prior and subsequent to his original conviction and its reversal by the Air Force Court of Review. If DeChamplain were to be retried and convicted, there is a substantial possibility that, with credit for time-served prior to such conviction, he would no longer be in confinement by the time he will have exhausted his military remedies.

[22]There can be no doubt that a court-martial conviction, even where *no* confinement is imposed, affects a serviceman's "good name, reputation, honor [and] integrity," *Wisconsin v. Constantineau*, 400 U.S. 433, 437; *Board of Regents v. Roth*, 408 U.S. 564, 573-574, and that an unlawful conviction therefore deprives him of a "liberty" right. See *Gallagher v. Quinn*, 363 F.2d 301, 304 (D.C.Cir. 1966), *cert. den.* 385 U.S. 881; *Kauffman v. Sec'y. of the Air Force, supra*, 415 F.2d at 995.



*York*, 392 U.S. 40. As was succinctly stated by the Court of Appeals for the District of Columbia Circuit in *Gallagher v. Quinn*, 363 F.2d 301 (1966), *cert. den.* 385 U.S. 881:

> "The Supreme Court is the final arbiter of due process under the Constitution. The Supreme Court has not been granted jurisdiction to review either on direct appeal or by certiorari a decision of the Court of Military Appeals. The consequence is that unless jurisdiction lies in the District Court in such a case as this, with appellate jurisdiction in this court and then in the Supreme Court, the constitutional validity of the Act of Congress cannot be decided except by the military tribunal." *Id.* at 304.[23]

In a similar vein the Court of Claims in *Augenblick v. United States*, 377 F.2d 586 (Ct. Cl. 1967), *rev'd. on other grounds*, 393 U.S. 348 held:

> "There is no adequate reason for looking to habeas corpus alone, or for thinking that Congress limited its exception from 'finality' to that specific proceeding. Liberty is of course important, but so are a man's career, his livelihood, his rights as a veteran, his status as a convicted criminal, and his reputation. To deny collateral attack to one not in confinement – the consequence of saying that habeas corpus is the only remedy – would be to deny the possibility of review by a constitutional court, and ultimately by the Supreme Court, of the constitutional claims of servicemen like

[23]This Court has noted the lack of expertise of military tribunals in dealing with constitutional questions. *O'Callahan v. Parker*, 395 U.S. 258, 265; *Noyd v. Bond*, 395 U.S. 693, 696, n.8.

plaintiff who have not been sentenced to jail or who have been released." *Id.* at 592.[24]

### B. Judicial Precedent Supports Collateral Review Of Court-Martial Determinations Other Than By Habeas Corpus.

This Court traditionally has entertained collateral attacks on courts-martial in a variety of forms of action not restricted to habeas corpus. See *Wise v. Withers*, 3 Cranch 331 (action in trespass); *Houston v. Moore*, 5 Wheat. 1 (action in replevin); *Dynes v. Hoover*, 20 How. 65 (action for assault, battery and false imprisonment); *Smith v. Whitney*, 116 U.S. 167 (writ of prohibition); *Runkle v. United States*, 122 U.S. 543 (action for back pay); *Swaim v. United States*, 165 U.S. 553 (action for back pay). Indeed, the Court's sanction of the use of such collateral remedies predated its approval in *Ex Parte Reed*, 100 U.S. 113, of resort to habeas corpus.[25]

[24] *Accord, United States v. Frischolz*, 16 USCMA 150, 36 CMR 306 (1966); *Kauffman v. Secretary of the Air Force, supra; Homey v. Resor*, 455 F.2d 1345 (D.C. Cir. 1971); *Smith v. McNamara*, 395 F.2d 896, 899 (10th Cir. 1968), *cert. den.* 394 U.S. 934; *Melvin v. Laird*, 365 F.Supp. 511 (E.D.N.Y. 1973). Many commentators agree. See, *e.g.*, Weckstein, *Federal Court Review of Courts-Martial Proceedings*, 54 Mil. L. Rev. 1, 27 (1971); Slattery, *Federal Court Review of Decisions of Military Tribunals*, 40 U. Cin. L. Rev. 569 (1971); Note, *Civilian Court Review of Court Martial Adjudications*, 69 Col. L. Rev. 1259, 1273-1279 (1969).

[25] A careful and scholarly review of the early cases in this Court may be found in the exhaustive opinion in *Brown v. United States*, 365 F.Supp. 328 (E.D.Pa. 1973).



In *Gusik v. Schilder, supra*, the Court considered the effect upon the above cases of the finality provisions of the then-recently enacted Article 53 of the Articles of War.[26] The Court held that Congress did not intend to break the historical practice of collateral review and that habeas corpus therefore was ultimately available to Gusik. The Court noted the continuing validity of the cases allowing collateral attack other than by habeas corpus. 340 U.S. at 133, n.3.

### C. Article 76 Was Not Intended To Alter The Historical Availability Of Collateral Review Of Court-Martial Proceedings By Means Other Than Habeas Corpus.

The language and legislative history of Article 76 demonstrates that it was not intended to change the law with respect to the availability of various forms of collateral attack in federal courts. We examine the statute in the light of the principle that there must be "'clear and convincing' evidence of congressional intent . . . before a statute will be construed to restrict access to judicial review," *Johnson v. Robison*, 415 U.S. 361, 373-374,[27] and in light of the Court's comment in *Gusik* that such a "break with history would have been

[26] Article 53 was identical in terms to Article 76 of the U.C.M.J.

[27] See also *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141.

so marked that we believe the purpose would have been made plain and unmistakeable."[28] 340 U.S. at 133.

As an initial matter, the language of Article 76 does not explicity bar collateral review, and would not seem to do so by implication. *Cf., Johnson v. Robison, supra,* 415 U.S. at 367. The statute makes no reference at all to judicial review in the federal courts. The relevant language merely provides that the published orders and all proceedings of courts-martial "are binding upon all departments, courts, agencies, and officers of the United States . . . ," subject to two exceptional remedies within the military. Thus, the Court of Military Appeals has held that Article 76 merely "describes the normal terminal point for proceedings within the court-martial system" and consequently it "does not insulate a conviction from subsequent attack in an appropriate forum. At best it provides finality only as to interpretations of military law by this Court [Court of Military Appeals]." *United States v. Frischolz,* 16 U.S.C.M.A. 150, 36 C.M.R. 306, 307 (1966). *Accord, Gallagher v. Quinn,* 363 F.2d 301 (D.C. Cir. 1966), *cert. den.* 385 U.S. 881; *Augenblick v. United States,* 377 F 2d 586 (Ct.Cl. 1967), *rev'd. on other grounds,* 393 U.S. 348. The two exceptions in the statute

[28] The government admits that there is a long history of collateral review of military determinations other than by habeas corpus (*Avrech* Brief, p.5, n.7), but it argues that Congress intended to change this historic practice when it enacted the Uniform Code of Military Justice. Yet, the government fails to point to a single shred of evidence that Congress had such a purpose, let alone that it was "plain and unmistakeable." Indeed, we show in the text, *infra*, that Congress did not intend to affect federal court collateral review at all when it last amended the Articles of War in 1948 (62 Stat. 637) or when it replaced them with the U.C.M.J. in 1949.



reinforce that view; they relate solely to exceptions to finality within the military. There is absolutely no indication from the words of Article 76 that Congress addressed itself to collateral review at all, let alone that it meant to distinguish between habeas corpus and other forms of collateral attack.[29]

This view is consistent with a line of decisions in this Court that finality provisions in statutes normally apply only to the administrative proceedings provided for by the statute and not to the availability of judicial review. *Estep v. United States,* 327 U.S. 114 (Selective Service Act); *Shaughnessy v. Pedreiro,* 349 U.S. 48 (Immigration and Nationality Act); *Brownell v. Tom We Shung,* 352 U.S. 180 (Immigration and Nationality Act); *Johnson v. Robison, supra* (Veterans Readjustment Act).

The history and context of Article 76 conclusively support this interpretation of its limited scope.

Until 1948, Articles 50 and 50½ of the Articles of War provided the method within the military by which court-martial adjudications were reviewed. Those articles did not contain a "finality" provision; nevertheless, it is apparent that there existed a well-established principle of finality *within* the system of military justice. That principle, however, was imprecise and uncertain. See, *e.g., Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, on H.R 2575* (hereinafter "Hearings"), 80th Cong. 1st Sess., pp. 2118, 2070 (1947). Accordingly, the War Department

[29] Indeed, if Article 76 is viewed as barring other forms of collateral attack, then its language compels the conclusion that it bars habeas corpus review as well.

proposed several changes in Article 50 to remove the ambiguity by including a "finality" provision. No suggestion was made that the provision was to effect a change with respect to collateral review, which, as we have seen, was and historically had been available in a variety of forms. Rather the purpose was to clear up a perceived problem with respect to finality within the military. Thus in his letter of transmittal to the House Committee on Armed Services, Secretary of War Robert P. Patterson wrote:

> "Section 26 . . . amends the present provisions of Article 50½ to make explicit the finality of sentences of court-martial." H.R. Report No. 1034, 80th Cong. 1st Sess., p.12 (1947).

During the hearings before the House Subcommittee, General Hoover, Assistant Judge Advocate in the Department of the Army who explained the proposed amendments to the subcommittee, stated that the new Article 50 merely took the place of then-Article 50½ since the old Article was "somewhat unintelligible" and "an effort has been made to clarify it." *Hearings* at 2070. General Hoover further explained that:

> "The principle of [finality within the military justice system] is well established at present but the amendment is somewhat more definite than the present article." *Hearings* at 2118.[30]

[30]Indeed, in its brief in *Gusik v. Schilder, supra*, the government argued that in adopting the finality amendments in the form of Articles of War 50(h) and 53, "Congress simply made explicit what had been the practice throughout the years . . . ." Brief for the Respondent, October Term 1950, No. 110, pp. 13-14. This should be read in conjunction with the government's concession in its *Avrech* brief (p. 5, n.7) that the practice throughout the years had been to allow collateral review in a variety of forms..



The House Report which accompanied the bill stated with reference to Article 50:

> "5. A more adequate review should be provided.
>
> "Any system of judicial review is complicated, technical, and difficult to understand. The principal provisions of judicial review are presently contained in articles of war 50 and 50½. In an attempt to clarify these sections they have been rewritten by the War Department in section 26 of the bill. The new section provides for a new judicial council of three general officers, in addition to the present board of review, and defines the action to be taken upon cases examined. The section makes explicit the finality of sentences of court martial, and, for the first time, authorizes reviewing authorities to weigh the evidence in addition to determining the law. Absence of this authority heretofore has been a common cause of criticism." *House Report 1034, supra* at 7.

Throughout the entire discussion of the various amendments relating to the review provisions, General Hoover never suggested that this provision eliminated, foreclosed, or had any reference at all to the question of review of court-martial convictions in the civilian courts.

The House passed the bill in 1947 but no comparable provision was enacted by the Senate. In 1948 the Senate enacted a Selective Service Act which contained, in Title II, the provisions of the 1947 House bill. The House version of the Selective Service Act did not contain any provisions relating to the Articles of War, but the Conference Committee of the House and Senate accepted the Senate bill. See generally, *U.S. Code and*

*Congressional Service*, 80th Cong. 2nd Sess., 1989-2018 (1948).

The new law amended Article 50 to provide, *inter alia*, that the

> "... orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States...." Article 50(h), Articles of War.[31]

Article 76 of the U.C.M.J. is the direct and immediate descendant of Article 50(h) of the Articles of War. In the 1949 hearings on the proposed U.C.M.J., the *ad hoc* committee appointed by the Secretary of Defense to draft the bill merely noted that Article 76 "is derived from A.W. 50(h) and is modified to conform to terminology used in this code." *Hearings Before a Subcommittee of the Committee on Armed Services, House of Representatives, on H.R. 2498*, 81st Cong. 1st Sess., 1222 (1949). In testimony before the subcommittee, Professor Edmund M. Morgan, Jr. and Felix Larkin, Assistant General Counsel to the Defense Department, the members of the *ad hoc* committee who explained the bill's provisions to the House subcommittee, never suggested that the finality language would curtail collateral review of court-martial convictions in federal court in any manner. *Id.* at 603-604, 1222-1223. In short, the perfunctory attention paid to the Article throughout the entire legislative process supports the view that it was intended merely to recodify Article of War 50(h) without affecting

[31] Article 50-½ was eliminated.



substantive change.[32] And we have seen that Article of War 50(h) did not affect the historical availability of collateral review in a variety of forms.

*Senate Report No. 486*, 81st Cong. 2nd Sess. (1950), on the bill stated, with respect to Article 76:

> "This Article is derived from AW 50(h) and is modified to conform to terminology used in this code. Subject only to a petition for a writ of habeas corpus in Federal court, it provides for the finality of court-martial proceedings and judgments."

It is upon this--and a similar reference to habeas corpus in the House Report that the government relies in urging that habeas corpus is the only form of collateral review permitted under Article 76 (Govt. Brief at 24). However, nothing in the hearings indicated that habeas corpus was to be the sole method of review; habeas corpus was probably referred to in the Reports because it was the method of collateral review that was customarily followed and that was commonly known to the Congressmen. See *Augenblick v. United States*, *supra*, 377 F.2d at 592. Thus Senator Kefauver, the Chairman of the Senate subcommittee that worked on the bill and the floor manager on the Senate floor, emphasized to the Senate that "the point I am trying

[32] Since the U.C.M.J. was enacted as a result of criticism of the military justice system, see *Senate Report No. 486*, 81st Cong. 2nd Sess. (1950), it would run counter to the very purpose of that Act (which was to provide greater protections to servicemen) to hold that Congress intended to cut off resort to federal courts for servicemen who wished to raise constitutional challenges to court-martial proceedings and convictions.

to make is that the pending bill adds nothing new in the matter of finality of court-martial proceedings . . . ." 96 *Cong. Rec.* (daily ed.) 1414.[33] Compare *Shaughnessy v. Pedreiro*, 349 U.S. 48, where the Court held that a deportation order could be challenged by a declaratory judgment action despite language in the Senate Reports on the Immigration and Nationality Act of 1952 to the effect that habeas corpus was the only available remedy. See the dissenting opinion of Mr. Justice Minton, 349 U.S. at 56-57.

Indeed, the government's brief in *Gusik* itself recognized that the finality provisions of Articles 50(h) and 53 of the Articles of War, and the then-recently passed Article 76 of the U.C.M.J., have identical meaning, and do not preclude collateral review. See Brief for Respondent in *Gusik v. Schilder*, October Term 1950, No. 110, pp.12-18.[34]

[33]Even those who opposed the proposed U.C.M.J. on the grounds, *inter alia*, that it failed to provide direct review by the federal courts of military law decisions, were agreed that it did not alter the prior availability of collateral review other than by habeas corpus. See, *e.g.*, Keefe and Moskin, *Codified Military Injustice - An Analysis of the Defects in the New Uniform Code of Military Justice*, 35 Cornell L.Q. 151 (1949), introduced into the record and discussed favorably by Senator Morse, 96 Cong. Rec. 1434-1441. The article noted that court-martial determinations "will still be open to collateral attack," as, for example, by habeas corpus or a suit for back pay in the Court of Claims. 96 Cong. Rec. 1439.

[34]As already noted here, the *Gusik* Court held that Article 53, whose language with respect to finality was identical to that contained in Article 76, did no more than describe "the terminal point for proceedings within the court-martial system," 340 U.S. at 132, and specifically noted that collateral judicial review was not limited to habeas corpus but embraced a wide variety of forms of action. 340 U.S. at 133, n.3.



### D. If Article 76 Does Bar Collateral Review Other Than By Habeas Corpus, It Is Unconstitutional.

Any doubts as to whether or not Congress intended to limit collateral review of court-martial determinations other than by habeas corpus should be resolved in favor of allowing review. For if Article 76 indeed does cut off such review, thereby preventing numerous servicemen from ever presenting to an Article III court constitutional challenges to their court-martial convictions, it is manifestly unconstitutional.

This Court has never explicitly decided the question of whether a defendant against whom the government initiates criminal charges (or upon whom the government seeks to impose severe limitations upon liberty or property) should have an opportunity to present his constitutional claim to an Article III court at some point in the judicial review process. See *Gusik v. Schilder, supra*, 340 U.S. at 133; *Johnson v. Robison, supra*, 415 U.S. at 373-374. Rather the Court has strained, often imaginatively, to find avenues by which constitutional rights ultimately can be presented to a federal court, thereby avoiding the constitutional issue.[35] Nevertheless, the central role of Article III courts in the constitutional scheme, as emphasized in numerous opinions of this Court, assures that the answer to the question must be in the affirmative. See

[35]*See e.g., Monongahela Bridge Co. v. United States*, 216 U.S. 177; *Estep v. United States, supra; Shaughnessy v. Pedreiro, supra; Brownell v. Tom We Shung, supra; Johnson v. Robison, supra.*

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953), reprinted in Hart & Wechsler, *The Federal Courts and the Federal System*, pp. 330-360 (2d Ed. 1973).

Under Article III, "the judicial Power of the United States shall be vested" in the Supreme Court and such inferior federal courts as Congress may "ordain and establish," and extends to all "Cases and Controversies arising under the Constitituon . . . ." Article III, therefore, creates in the federal judiciary a separate and co-equal branch of the national government. Article III courts "are the acknowledged architects and guarantors of the integrity of the legal system," Jaffe, *Judicial Review: Questions of Law*, 69 Harv. L. Rev. 239, 274 (1955), and they have the ultimate responsibility of passing upon questions of individual rights and liberties arising under the Constitution. *Cf.*, *Marbury v. Madison*, 1 Cranch 137; *United States v. Nixon*, ____ U.S. ____, 94 S.Ct. 3090 (1974).

Accordingly, the Court never has sanctioned curbs on the judicial power of Article III courts so as to foreclose completely the opportunity to present constitutional claims before such courts.[36] Indeed, the Court

[36]In each case in which the court sanctioned *some* curbs on the judicial power of federal courts, there has remained open another avenue to protect constitutional rights in Article III courts, and ultimately in this Court. For example, in *Ex Parte McCardle*, 7 Wall.506, where the Court upheld the power of Congress to withdraw this Court's *appellate* jurisdiction over habeas corpus review, the avenue of original Supreme Court habeas corpus jurisdiction remained open, and subsequently was explicitly upheld by the Court in *Ex Parte Yerger*, 8 Wall.85. Similarly, denial of a



repeatedly has emphasized that the fundamental role of Article III courts must be preserved.[37] Thus, in *Crowell v. Benson*, 285 U.S. 22, the Court held that:

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Id.* at 60.

The significance of the *Crowell* case often is misunderstood. While the Court divided, with Justices Brandeis, Stone and Roberts dissenting, on the issue of whether *de novo* judicial review was required of administrative determinations of "jurisdictional facts," there was no disagreement on the fundamental principle that questions of law especially questions of constitu-

draftee's remedy to test his induction in *Falbo v. United States*, 320 U.S. 549, was later shown to be no more than a simple requirement of exhaustion of administrative remedies; the draftee was free to raise his claim of unlawfulness in a defense to a subsequent prosecution. *Estep v. United States*, 327 U.S. 114. See also *Lockerty v. Phillips*, 319 U.S. 182, and *Yakus v. United States*, 321 U.S. 414, where defendants were required to raise constitutional challenges under the Emergency Price Control Act of 1942 exclusively before a special Emergency Court of Appeals, but still had available the avenue of *certiorari* review in this Court. These and other similar cases are discussed and analyzed in Hart & Wechsler, *The Federal Courts and the Federal System*, *supra*, pp.330-360. More recently in *Palmore v. United States*, 411 U.S. 389, where the Court upheld the provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473, requiring that "local" crimes be *tried* before Article I judges, *certiorari* was available to this Court to review constitutional and other errors. 411 U.S. at 396.

[37]At least unless, in time of civil strife, the civilian courts cannot remain open. *Ex Parte Milligan*, 4 Wall.2.

tional law—must ultimately be reviewable in an Article III Court. See Hart & Wechsler, *supra* at 339-340. This was made clear several years later in *St. Joseph Stock Yards v. United States*, 298 U.S. 38, where Justice Brandeis, in a concurring opinion joined by Justices Stone and Cardozo, wrote:

> "The supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." 298 U.S. at 84.

Similar views often have been expressed by other members of the Court, as compelled by both Article III and the due process clause of the Fifth Amendment. See, *e.g.*, *Martin v. Hunter's Lessee*, 1 Wheat.304, 328-329; *Stark v. Wickard*, 321 U.S. 288; *Estep v. United States*, *supra*, 327 U.S. at 120, 127, 132-133 (Rutledge and Murphy, J.J., concurring); *Harmon v. Brucker*, 355 U.S. 579, 581-582; See *Ng Fung Ho v. White*, 259 U.S. 276, 284-285, and cases cited therein.

But, it might be asked, how can one have a right to present a constitutional claim or defense to an Article III court when Congress has discretion not to create any inferior federal courts,[38] and to create exceptions to the appellate jurisdiction of the Supreme Court? There are several answers to this seeming contradiction.

First, the "exceptions clause," like any other

[38]See *Palmore v. United States*, 411 U.S. 389, 401; *Sheldon v. Sill*, 8 How. 441. But see *Martin v. Hunter's Lessee*, *supra*.



constitutional provision, cannot be read *in vacuo*: its scope must be determined as part of a unified document providing for one Supreme Court, supremacy of the federal law, and due process of law. Accordingly, Congress is not free to restrict the appellate jurisdiction of the Supreme Court in a way that would negate the Court's "essential constitutional functions of maintaining the uniformity and supremacy of federal law." Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 201-202 (1970).[39]

More fundamentally, the twin powers to create or not inferior federal courts and to make exceptions to this Court's appellate jurisdiction cannot be viewed in isolation; those powers must be exercised in a way that preserves due process of law and the judicial power of the United States. While Congress may have some leeway in deciding in what Article III courts to repose the federal judicial power, it does not have power to repose it nowhere. Otherwise, the role of the federal judiciary as a separate and co-equal branch of government would be destroyed.

[39]See also Hart & Wechsler, *supra* at 331 (Congress' exercise of the "exceptions clause" "must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."); Levy, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court: A Reappraisal*, 22 N.Y.U. Intra. L. Rev. 178 (1967). Thus, it has been argued that the "exceptions clause" was intended solely to deal with the problem of appellate review of findings of fact by a jury. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 Minn. L. Rev. 53 (1962); Berger, *Congress v. the Supreme Court* 285-96 (1969). But see Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1005-06 (1965).

The point was made by Mr. Justice Story in his opinion in *Martin v. Hunter's Lessee*, *supra*, and in his *Commentaries on the Constitution*, where he wrote:

> "If Congress possess any discretion on the subject, it is obvious that the judiciary, as a co-ordinate department of the government, may, at the will of Congress, be annihilated, or stripped of all its important jurisdiction; for, if the discretion exists, no one can say in what manner, or at what time, or under what circumstances it may, or ought to be exercised. The whole argument, upon which such an interpretation has been attempted to be maintained, is that the language of the Constitution, 'shall be vested,' is not imperative, but simply indicates the future tense. This interpretation has been overruled by the Supreme Court, upon solemn deliberation [citing *Martin v. Hunter's Lessee*]." 3 *Commentaries on the Constitution* 449 (1833).

Justice Story, of course, overstated his case. He argued that Congress must vest all of the judicial power not vested as an original matter in the Supreme Court in one or more inferior federal courts. As we have seen,[40] this part of Justice Story's argument is no longer tenable, if indeed it ever was. The flaw in Justice Story's analysis was that he failed to give proper scope to the historical and constitutional role of the state courts as "guarantors of constitutional rights." Hart & Wechsler, *supra* at 359. Congress need not vest the entire federal question jurisdiction as an original matter in lower federal courts because the state courts are available to decide such questions in the exercise of their general jurisdiction. *Palmore v. United States*,

[40]See n. 38, *supra*.



*supra*, 411 U.S. at 401, 407. As long as the Supreme Court possesses appellate jurisdiction over the state courts, at least with respect to federal questions, the constitutional scheme of Article III is preserved. See Hart & Wechsler, *supra*.

Accordingly, Congress may be free to restrict or abolish the jurisdiction of the lower federal courts provided that it leaves undisturbed the general jurisdiction of the state courts and the appellate or *certiorari* jurisdiction of this Court, or it may be free to make exceptions to the latter jurisdiction provided that it permits a remedy either in some lower Article III court, or, as an original matter, in this Court.[41] But it cannot be presumed that the Founders intended to confer a federal judicial power, embodying due process of law and judicial review, and that at the same time they intended to bestow upon the national legislature the means to destroy that judicial power and substitute rule

[41]This was the view of Henry Wheaton, reporter for this Court in the early nineteenth century, who wrote a series of articles in the *New York American* in July and August, 1821, under the signature "A Federalist of 1789." Wheaton argued that Congress does have a duty to vest the federal judicial power in some Article III court with respect to all cases "arising under" federal law. The power need not be vested at all in *inferior* federal courts, however, as long as the Supreme Court retained appellate jurisdiction over the state courts for all cases not vested in lower federal courts: "... so far as Congress may constitutionally restrain *original* jurisdiction as to such cases, they must give that which is *appellate*; and appellate jurisdiction where there is no original federal jurisdiction, must, of course, be exercised on the judgment of the state courts...." *New York American*, August 3, 1821 (emphasis in original), as quoted in Hart & Wechsler, *supra* at 314-315, n.2.

by executive or administrative bureaucracy. See Hart & Wechsler, *supra* at 331.[42] For such a scheme would create the means for destruction of the very constitutional scheme of separation of powers that the 1787 Convention endeavored to create. As this Court had occasion to note most recently:

> "Notwithstanding the deference each branch must accord the others, the 'judicial power of the United States' vested in the Federal courts by Article III, section 1 of the Constitution can no more be shared with the executive branch than the chief executive, for example, can share with the judiciary the veto power, or the Congress share with the judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite Government. The Federalist No. 47, p. 313 (C.F. Mittel ed. 1938). We therefore reaffirm that it is 'emphatically the province and the duty' of this Court 'to say what the law is' . . . [citing *Marbury v. Madison, supra*, 1 Cranch at 177]." *United States v. Nixon, supra*, 94 S.Ct. at 3106.

Nor can the military be viewed as an exception to the general rule. While this Court has found that the

[42] *Palmore v. United States, supra*, is not contra. There, the Court merely held that Congress need not provide for criminal *trials* of all congressionally created crimes in Article III courts; it did not address the problem of whether Congress could preclude all review of constitutional questions in Article III courts. Indeed, review by *certiorari* ultimately was available in this Court, and Palmore in fact obtained such review. 411 U.S. at 396.



military is a society with special needs of discipline and good order, *Parker v. Levy*, ____ U.S. ____, 94 S.Ct. 2547 (1974), it clearly is not beyond the judicial power of the United States. Servicemen are entitled to the basic guarantees of due process of law, *Burns v. Wilson, supra*, and are entitled to raise constitutional claims in Article III courts. *Gusik v. Schilder, supra*. Indeed for reasons recognized by this Court, it is precisely in military courts that the greatest danger to constitutional rights may exist. Military tribunals do not "rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty, or property." *Toth v. Quarles*, 350 U.S. 11, 17. Accordingly, constitutional questions raised in military tribunals ultimately must be susceptible of review by an Article III court. *Gallagher v. Quinn, supra*.

Therefore, the total deprivation of collateral review (other than by habeas corpus) of legal determinations of military tribunals, which would flow from the government's reading of Article 76, would be contrary to the deepest principles of Article III and the Fifth Amendment to the Constitution.

## POINT III.

**A UNITED STATES DISTRICT COURT MAY ENJOIN A PENDING COURT-MARTIAL WHERE CLEAR AND SUBSTANTIAL VIOLATIONS OF A SERVICEMAN'S CONSTITUTIONAL RIGHTS WILL OCCUR IF THE COURT-MARTIAL IS ALLOWED TO TAKE PLACE, NO MATERIAL FACTS ARE IN DISPUTE, NO INTERPRETATION OF SPECIALIZED MILITARY LAW IS NECESSARY, AND THERE IS LITTLE PROBABILITY THAT THE RIGHTS ASSERTED CAN BE VINDICATED IN THE MILITARY COURTS.**

Since Article 76 does not limit federal court jurisdiction over decisions of military tribunals to review by habeas corpus only, see Point II, *supra*, there is no statutory or constitutional "jurisdictional" limitation upon the exercise of a federal court's equity powers prior to a court-martial. No equivalent exists to the anti-injunction statute, 28 U.S.C. §2283, which, with certain major exceptions,[43] acts as a bar to federal court injunctions against pending state court judicial proceedings. The question of whether or not such injunctions may be entered, therefore, is one of the proper policy to be followed by federal courts within the very broad area of their federal question jurisdiction.

The government draws an analogy to the judicially developed comity doctrine, by which federal courts

[43] *E.g.*, 42 U.S.C. §1983 and 28 U.S.C. §1343; see *Mitchum v. Foster*, 407 U.S. 225.



abstain from interference with pending state court prosecutions except in cases of bad faith enforcement or where there is a likelihood of irreparable harm,[44] and argues that that doctrine should be fully applied to court-martial proceedings (Govt. Br. at 20-26). But there are fundamental differences between state criminal proceedings and trial by court-martial; analysis of those differences supports a less stringent application of the comity doctrine allowing a broader range of discretion within which district judges may decide whether or not to intervene in court-martial proceedings.

First, and most fundamentally, the special respect and deference afforded to the "independent" sovereignties of the states is of unique historical and cosntitutional moment and has been emphasized repeatedly by this Court.

> "This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.'" *Younger v. Harris, supra*, 401 U.S. at 41.[45]

[44] *Younger v. Harris*, 401 U.S. 37; *Dombrowski v. Pfister*, 380 U.S. 479; *cf.*, *Steffel v. Thompson*, 415 U.S. 452.

[45] See also *Truax v. Corrigan*, 257 U.S. 312, 344 (Holmes, J., dissenting); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting); *Hawks v. Hamill*, 288 U.S. 52; *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501; *Burford v. Sun Oil Co.*, 319 U.S. 315, 318; *Darr v. Burford*, 339 U.S. 200, 204; *Lousiiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28-29; *Johnson v. Louisiana*, 406 U.S. 356, 376-377 (Powell, J., concurring); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 40.

The state courts play a central and essential role in the constitutional scheme as "the primary guarantors of constitutional rights," Hart & Wechsler, *supra* at 359; we have seen that the predominant historical view is that Congress need not have created lower federal courts at all, but rather could have remitted all controversies as an original matter to the state courts.[46]

The historical tradition and practice with respect to the military on the other hand, is quite different; rather than affording the military room for independence from federal civilian authority, the policy has been to narrow the scope of the military's authority and to render it subservient to the civilian government. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2; *Duncan v. Kahanamoku*, 327 U.S. 304, 307, 318; *Reid v. Covert*, 354 U.S. 1, 21; *Toth v. Quarles*, 350 U.S. 11, 23; *O'Callahan v. Parker*, 395 U.S. 258. There were few issues that concerned the leaders of the American Revolution so deeply as the fear that the military arm of our government might dominate the civilian. Indeed, as the *Reid* Court pointed out, 354 U.S. at 29, the Declaration of Independence itself protested that George III had "affected to render the Military independent of and superior to the Civil Power." Thus, there can be no room for the view that the military may escape civilian control or be treated as an independent sovereign. *Parisi v. Davidson*, 405 U.S. 34, 51 (Douglas, J., concurring).

[46]With the exception, of course, of those cases for which the Supreme Court has original and exclusive jurisdiction, and provided that some Article III court may ultimately pass on questions of federal constitutional law. See Point IID, *supra*.



The opposing historical and constitutional attitudes toward the states on the one hand and the military on the other are justified, especially with respect to the judicial systems of each. The respect for and sensitivity to constitutional rights and liberties is much greater among state civilian authorities and state courts than in the military. State courts have a long common law tradition of due process. State court judges deal with the full range of judicial problems, and have as their primary responsibility the protection of the rights guaranteed by the Constitution. Accordingly, it may be presumed that a state court criminal defendant will suffer no irreparable harm if he must raise constitutional defenses as an initial matter before the trial court. *Younger v. Harris*, *supra*, 401 U.S. at 49.

Unfortunately, but perhaps inevitably, the same cannot be said about the military. The military's major purpose is to fight and prepare for wars; as the Court has often noted, its concern for individual rights is secondary at best. *Toth v. Quarles*, *supra*, 350 U.S. at 17-18; *O'Callahan v. Parker*, *supra*, 395 U.S. at 262; *Reid v. Covert*, *supra*, 354 U.S. at 21, 29. Moreover, the protections of indictment by grand jury and trial by jury are not present in military courts-martial; these are precisely the means by which an accused in a civilian trial may be protected against arbitrary executive or judicial action. "On many occasions, fully known to the Founders of this country, jurors - plain people - have manfully stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices." *Toth v. Quarles*, *supra*, 350 U.S. at 18-19. See also *United States v. Spock*, 416 F.2d 165, 181-183 (1st Cir. 1969).

Finally, the institutional framework by which the independence of federal and many state judges is assured is not present in the military. For example, federal judges have life tenure, compensation which cannot be reduced in their lifetime, and can be removed only by impeachment; military judges not only lack these protections, but they, and the members of court-martial juries, are further subject to subtle, or not so subtle, pressures of command influence:

> "The suggestion of the possibility of influence in the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger." *O'Callahan v. Parker, supra*, 395 U.S. at 264.

Thus, close analysis reveals that the various rationale for "comity" between the federal and state court systems simply do not apply to attempts to enjoin military courts-martial. In fact, precisely because those rationale are not applicable, a closer degree of federal court surveillance over the military courts is both desirable and appropriate.

There are, of course, several countervailing considerations. Certainly it would defeat the purpose of a separate military "judicial" system if an accused serviceman could freely interrupt court-martial proceedings to raise any conceivable issue in federal court. And military trials may involve factual determinations and interpretations of special military laws and regulations which military courts and judges are in the best position to make, at least in the first instance. In such



cases, as the Court suggested in *Noyd v. Bond*, 395 U.S. 683, 696 and n. 8, the best course may well be to allow the military courts to decide the question before the federal courts intervene.

Where, however, no substantial relevant factual questions are in issue, and where interpretation of specialized and often arcane military law is not necessary, the rationale for federal court abstention is mitigated considerably. And, when the military acts to deprive the accused of substantial federal rights going to the very integrity of the trial process itself, and where there is little probability that the rights asserted will be favorably viewed by the military courts, the necessity for federal court intervention becomes compelling.

The cases clearly support a "flexible [and] discretionary"[47] doctrine permitting the federal courts to intervene in such cases; this Court repeatedly has sanctioned interference with ongoing military proceedings to correct fundamental constitutional errors. See, *e.g.*, *Billings v. Truesdale*, 321 U.S. 542; *Toth v. Quarles, supra*; *Reid v. Covert, supra*; *McElroy v. Guagliardo*, 361 U.S. 281; *Parisi v. Davidson, supra*. In *Noyd v. Bond, supra*, the Court explained that in cases such as *Toth*, *Reid*, and *McElroy, supra*, it had intervened because the claims raised pure questions of constitutional law about which the military courts possessed no expertise, and because the claims were jurisdictional. 395 U.S. at 696, n. 8. The crucial elements would appear to be the presence of factual disputes and the existence *vel non* of "expertise":

[47] See *Dooley v. Ploger*, 491 F.2d 608, 613 (4th Cir. 1974).

> "While ... [the petitioners] in the civilian cases [*Toth, Reid, McElroy*, etc.] challenged 'the right of the military to try them at all' under the constitutional grant of court-martial jurisdiction, this type of claim is present in every constitutional and jurisdictional attack. The significant distinction ... is that ... [r]esolution of the civilian cases principally involved traditional questions of constitutional law ....[T]he civilian cases involved no disputed questions of fact and no questions on which the expert opinion of the military courts would be helpful." *Dooley v. Ploger*, 491 F.2d 608, 614 (4th Cir. 1974). [48]

The Fourth Circuit in *Dooley* also emphasized that a federal court should consider the likelihood of an effective remedy within the military justice system in deciding whether or not to intervene. If military law on the subject at issue is clear so that further resort to the military courts probably would be "futile," exhaustion should not be required. 491 F.2d at 614-615. This view echoed that of this Court in *Parisi v. Davidson, supra*:

> "[T]he court should stay its hand only if the relief [sought] ... would also be available ...

[48]The *Dooley* Court held that the attempts there to enjoin courts-martial must fail because of the presence of factual disputes going to the issues of whether the offenses charged were "service-connected" within the meaning of *O'Callahan v. Parker, supra*. The court did not rule out injunctive relief subsequent to factual determinations by the military court; rather, it merely held that the servicemen involved must exhaust their military remedies "to the extent that a military tribunal is given the opportunity to find the facts of service-connection, as well as guilt or innocence, and to impart its expert understanding of the impact of specific offenses on military capability." 491 F.2d at 610.



> with reasonable promptness and certainty through the machinery of the military justice system in its processing of the court-martial charge." 405 U.S. at 41-42.

The government argues, in effect, that a federal court may never intervene in pending court-martial proceedings.[49] It insists on finding, quite wrongly, an inflexible and categorical principle of general application that perceives the military establishment as entirely apart from and beyond the reach of the civilian courts, at least until after full exhaustion and resort to *habeas corpus* if available. It would recreate the military as a separate sovereign, even more independent than the states and to which even more deference would be due. In so doing, it would ignore the warnings and lessons of history, reasoned analysis, the meaning of the Constitution, and the course of judicial decisions in this and other courts.

Even in the armed forces, a criminal prosecution is not a mere routine detail, a matter of internal housekeeping. It is a unique and drastic procedure, having all of the purposes and effects of a civilian criminal proceeding. Procedures so grave as this are not committed to the military establishment, under our Constitution, unfettered by the basic safeguards of the Bill of Rights, or unencumbered by the precious inconvenience of civilian judicial scrutiny, necessary to make those basic safeguards work. *Burns v. Wilson*, 346 U.S. 137; *Kauffman v. Secretary of the Air Force, supra*. Ordinarily, of course, the civilian judicial scrutiny

[49]With the possible exception of attacks based upon lack of personal jurisdiction.

of military criminal administration is adequate if it comes at the termination of a military prosecution; and ordinarily - as in state criminal matters - it is properly reserved until that time. But where the usual reasons for abstention are not present,[50] and where an accused serviceman raises fundamental constitutional questions going to the very integrity of the court-martial process, the interests of justice require the immediate equitable intervention of the federal civilian courts.

## POINT IV.

### THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENJOINING APPELLEE'S COURT-MARTIAL UNTIL HE AND HIS CHIEF DEFENSE COUNSEL ARE GIVEN FULL ACCESS TO THE EVIDENCE UPON WHICH THE CHARGES ARE BASED.

The district court acted well within the limits of its discretionary power to issue a preliminary injunction on the "access to documents" cause of action. The issue involved pure questions of constitutional law, affecting the legitimacy of the trial process itself. There were no disputed material facts nor were there problems of interpretation and application of specialized military law. There was a strong likelihood that the constitutional issues would not receive favorable consideration in the military; indeed, appellee had raised the issues

[50] *I.e.*, the presence of disputed material factual issues and questions of "military" law and practice.



unsuccessfully before the military courts, including the Court of Military Appeals. There was little question that, on the merits, appellee was correct in his consitutional claim. See *Point V, infra*. And, there was a strong probability of irreparable harm if the district court did not intervene when it did.

A. The issue of access to evidence and documents involved a pure question of constitutional law: whether the limitations that the government sought to place upon defense counsel's access to and use of relevant and material evidence violated DeChamplain's Fifth and Sixth Amendment rights to due process, a fair and speedy trial, and effective assistance of counsel. There was no dispute as to the fact of the restrictions upon access and use. There was no dispute as to the relevance and materiality of the evidence at issue, which included the very documents that DeChamplain allegedly sought to turn over to a foreign agent and the record of DeChamplain's first court-martial on the identical charges. Significantly, the government never has argued that the documents are not relevant and material. Thus the only issue presented to the district court was whether the limitations upon use of the relevant evidence imposed by the Air Force and approved by the military court were constitutionally permissible.

B. We show in *Point V, infra*, that the access limitations imposed by the court-martial violate due process principles enunciated repeatedly by this Court and the lower federal courts since the earliest days of the Republic. Indeed, the government never presented a serious argument to the contrary, either in the district court or in its Brief here. The district court surely was correct in concluding that:

> "Plaintiff has demonstrated the likelihood of his prevailing on the merits; specifically, ... that civilian counsel is entitled to full access, subject to a protective order, to all documents relevant to the issues to be tried" (J.S. at 28).

Even more important, however, the limitations upon access fundamentally affected the integrity of the entire court-martial proceeding. The restrictions effectively denied to DeChamplain the opportunity to present and to have the court-martial consider recognized defenses to the espionage charges with which he was charged: whether the documents at issue "relate" to the national defense within the meaning of the Espionage Act, and whether the documents were in the "public domain" prior to the acts that DeChamplain is alleged to have committed. See *infra*, pp. 61-64. These were the very defenses for which civilian counsel was called into the case, and they were the very defenses upon which DeChamplain intended to base his defense (See App. at 39, 56-58). By denying the accused the opportunity to present these defenses in a meaningful manner, the court-martial in effect ousted itself of "jurisdiction"; intervention of the district court was necessary to prevent an arbitrary exercise of military authority that no longer could be identified as "judicial."[51]

[51]In *Whelchel v. McDonald*, 340 U.S. 122, 124, *reh. den.* 340 U.S. 923, the Court held that the denial to a court-martial defendant of an opportunity to present a relevant defense in an effective manner goes to the question of the jurisdiction of the court-martial to try the accused. This view was reaffirmed in *United States v. Augenblick*, 393 U.S. 348 at 352, where the Court noted that such a question is one of "traditional" jurisdiction. See also *United States ex rel. Mankiewicz v. Ray*, 399 F.2d 900 (2d Cir. 1968), where Judge Friendly, concurring, noted that federal intervention in court-martial proceedings is not ordinarily appropriate "where a court-martial has already been convened *and there was no showing that it would not consider [the accused's] defense[s]*" (emphasis added).



C. Despite the clear import of the decisions of the federal courts requiring that a defendant and his counsel be granted meaningful access to relevant evidence, even if that evidence involves national security matters, an accused serviceman cannot obtain such access in the military courts.[52] The Manual for Court-Martial (1969 Ed.) itself provides that:

> "Official communications and documents containing military or state secrets, including diplomatic correspondence, are privileged from disclosure in a court-martial proceeding where in the opinion of the head of the executive or military department or government agency concerned such disclosure would be detrimental to the national interest." MCM, par. 151(a).

Accordingly, the military courts, including the Court of Military Appeals, have refused to permit disclosure of relevant evidence on the basis that the evidence was classified. See *United States v. Levy*, 39 C.M.R. 672, 681 (ABR 1968), *ptn. for rev. den.*, 18 U.S.C.M.A. 627 (1969) (See Brief for Appellee in *Parker v. Levy*, ____ U.S. ____, 94 S.Ct. 2547 (1974), pp. 102-107); *cf.*, *United States v. Harvey*, 8 U.S.C.M.A. 538, 25 C.M.R.

[52]We show in *Point V C, infra*, that there can be no justification in "military necessity" or otherwise for denying access to evidence to servicemen accused of espionage while granting access to defendants accused of the identical crime before a federal district court.

42.[53] Indeed,this Court has noted that "in a court--martial, the access of the defense to compulsory process for obtaining evidence and witnesses is, to a significant extent, dependent on the approval of the prosecution." *O'Callahan v. Parker, supra*, 395 U.S. at 264, n. 4.

In the face of this authority within the military, DeChamplain nevertheless attempted to obtain access to the relevant evidence, before both the military judge and the Court of Military Appeals. Predictably, both attempts failed. See App. 62-63; *DeChamplain v. McLucas*, 22 U.S.C.M.A. 462, 47 C.M.R. 552 (1973).

Given these failures and the weight of military law authority, it is clear that there is little or no reasonable likelihood that DeChamplain ever could vindicate his Fifth and Sixth Amendment rights to access within the military court system. The only forum to which he could turn was the federal district court.

D. If DeChamplain were forced to undergo a trial under the conditions imposed by the military, the harm would have been irreparable; indeed, the prejudice would have been so clear and damaging that federal court intervention would have been proper even under

[53]Similarly, the military courts have approved the exclusion of the public and or the press pursuant to MCM, paragraph 53(e) in cases involving "national security" matters, thereby depriving the defendants of their right to a public trial. See, *e.g.*, *United States v. Neville*, 7 C.M.R. 180 (1952); *United States v. Northrup*, 31 C.M.R. 599 at 603 (1961); compare *United States v. Gorin*, 111 F.2d 712, 720 (9th Cir. 1940), *aff'd*. 312 U.S. 19; *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950), *cert. den.* 342 U.S. 920.



the strict comity doctrine of *Younger v. Harris, supra*, urged by the government.

It must be remembered that at the time the court-martial was scheduled to begin, DeChamplain already had been in confinement for over two years and had undergone one trial, which was tainted by illegal government action. The access restrictions would have deprived DeChamplain of the opportunity to present adequate defenses to the espionage charges, and further would have deprived him of the effective assistance of counsel of his choice, chosen specifically because of counsel's experience and expertise in defending similar charges. The chances of an acquittal under such circumstances clearly were minimized: it is probable that DeChamplain would have had to wait until he exhausted his military remedies (which we have seen would have been futile) and sought *habeas corpus* relief in the federal courts before his constitutional claims would have been vindicated. And even then he would not have been entitled to release, but rather would have faced a *third* court-martial on the same charges.

It is true that in the usual criminal case, allegation of an error that ultimately might result in reversal is not sufficient to enjoin the trial. *Younger v. Harris, supra*. But where the "error" involves a denial of the opportunity to present defenses and to be represented by counsel, the trial itself becomes a mockery of justice. See *United States v. Bergamo*, 154 F.2d 31 (3d Cir. 1946). The ordeal of a criminal trial is a costly and emotionally wrenching experience. To allow a trial to proceed where such fundamental errors exist, and where the ultimate result most probably will be yet a *third* trial under proper and lawful conditions, is to impose

arbitrary and unnecessary harm upon the accused. Under these circumstances it can in no sense be said that the defendant can protect his rights in the normal course of a "*single* criminal prosecution." *Younger v. Harris*, 401 U.S. at 46 (emphasis added).

If there is any discretion whatsoever for a federal district court to intervene to prevent irreparable harm and to protect the unmistakeable rights of an accused, see *Point III, supra*, surely there can be no better case for the exercise of such discretion than under the circumstances which were present here.

## POINT V.

### THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE GOVERNMENT EITHER MUST PROVIDE APPELLEE AND HIS CHIEF DEFENSE COUNSEL WITH UNLIMITED ACCESS TO AND USE OF RELEVANT EVIDENCE, SUBJECT TO A PROTECTIVE ORDER AGAINST DISCLOSURE TO THOSE NOT INVOLVED IN THE DEFENSE OF THE CASE, OR IT MUST DISMISS THE CHARGES.

DeChamplain was charged with unlawfully attempting to pass "classified" documents "relating" to the national defense to unauthorized persons, in violation of the Espionage Act of the United States, 18 U.S.C. §793. At his first court-martial, these and several other "classified" documents were put directly into evidence; they were not only relevant, but were central to the issues to be decided by the court-martial and were, in fact, the basis of the entire prosecution. At a



subsequent trial, the same documents would again be the basis for the prosecution and the primary evidence upon which the government would rely.

### A. Unlimited Access To The Documents And Record Of The Prior Trial Was Essential To A Proper Defense And To Effective Assistance of Counsel.

It is difficult to imagine a plainer and more shocking interference with a defendant's right to pursue a free and vigorous defense than to deny to his counsel the right to see, possess, refer to, and utilize as necessary the documents which are the very basis of the charges upon which the defendant is to be tried.

The espionage statute, 18 U.S.C. §793, poses singular problems of construction and application, requiring, *inter alia*: (a) a full exploration of the nature of the documents; (b) a full exploration of the extent to which the information in the documents, and information similar in nature, was and is publicly available, and how it came to be publicly available; (c) a full exploration of the consequences which reasonably could have been contemplated to result from their communication.[54]

[54] *Gorin v. United States, supra; United States v. Heine*, 151 F.2d 813 (2d Cir. 1945); *Boeckenhaupt v. United States*, 392 F.2d 24 (4th Cir. 1968), *cert. den.* 393 U.S. 896; *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952), *cert. den.* 344 U.S. 838; *United States v. Butenko*, 384 F.2d 554 (3rd Cir. 1967), *vacated sub nom, Alderman v. United States*, 394 U.S. 165. See generally, Edgar and Schmidt, *The Espionage Statutes and Publication of National Defense Information*, 73 Col. L. Rev. 929 (1973).

In *Gorin v. United States*, 312 U.S. 19, the Court interpreted section 793 narrowly in order to save it from constitutional attack on grounds of vagueness. First, it held that the statutory proviso that the defendant have "reason to believe that the information is to be used to the injury of the United States or to the advantage of a foreign nation" requires the government to prove that the defendant acted with *scienter*. 312 U.S. at 27-28. Second, the Court held that the relationship of the documents to national defense is a question for the trier of fact, and that the connection between the material at issue and the national defense must be "reasonable and direct" and "not a strained or arbitrary one." 312 U.S. at 31-32. The trier of fact may not be bound by the mere fact that the documents or information involved were classified; it must be allowed to determine that question independently. See *United States v. Heine, supra*, at 817; *United States v. Drummond*, 354 F.2d 132, 152 (2d Cir. 1965).

Finally, where the information transmitted by the defendant has been otherwise disseminated to its recipient or to the public by official or unofficial channels, the defendant may not be convicted of espionage:

> "As declared in *Gorin v. United States*, . . . it is obviously lawful to transmit any information about weapons and munitions of war which the services had themselves made public; and if that be true, we can see no warrant for making a distinction between such information, and information which the services have never thought it necessary to withhold at all." *United States v. Heine, supra*, 151 F.2d, at 816 (L. Hand, J.).



The court in *Heine* also held that it made no difference that the information in question was not passed on in precisely the form in which it was publicly available. "The section is aimed at the substance of the proscribed information, not at the act of making it more readily available for use." 151 F.2d at 817.

It is evident, therefore, that in an espionage prosecution, the information contained in the documents is in essence the *corpus dilecti* of the alleged crime. Accordingly the trial court must be permitted to hear evidence delving in detail into the connection between the particular material at issue and the national defense. In fact, in the recent case of *United States v. Russo and Ellsberg*, No. 9373 - WMB - CD (C.D. Calif. 1973), which charged violations of Section 793, the defense was permitted to present extensive evidence on the issues of relationship of the documents in question to the national security and of the reasonable knowledge of the defendants that communications of the documents would damage the national security (Boudin Affidavit, App. 36-52).

It therefore is plain that defense counsel must be permitted to retain copies of documents upon which the charges are based in order to put on an effective defense at trial. The materials must be carefully examined paragraph by paragraph, page by page, in order to follow through with possible defense strategies. Only in this way can the defense possibly meet the government's contention that the materials constitute papers relating to the "national defense." And only in this way can the defense conduct the proper research to determine whether or not the materials were in the "public domain" prior to the alleged unlawful dissemination.

Such documents can be of value to the defense only if they are at all times available in the offices of defendant's counsel. This is the standard practice in espionage prosecutions brought in the federal courts. For example, in *United States v. Russo and Ellsberg, supra*, and in *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), *cert. den.*, 342 U.S. 920, copies of great numbers of classified documents were given to defense counsel long before trial for retention and use as counsel saw fit (See Boudin affidavit, App. 37).

### B. In A Criminal Prosecution, The Government Must Disclose To The Defendant And His Counsel All Evidence Which Would Be Material Or Relevant To The Defense Or Suffer Dismissal Of The Case, Even When Such Evidence Includes Asserted "State Secrets"

In a criminal case the government is under a duty to disclose material evidence to the defense. Rule 16, Federal Rules of Criminal Procedure;[55] see Notes of the Advisory Committee on Rules; Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L. J. 1276 (1966); *Dennis v. United States*, 384 U.S. 855, 870-876. Where the government fails to comply with its duty, especially upon a request for access or disclosure by the defendant, it must suffer dismissal of the indictment. *Brady v. Maryland*, 373 U.S. 83; *United*

[55]It is to be noted that the Rules of Criminal Procedure shall be applied in cases before courts-martial and other military tribunals, except where impractical. Article 36(a), UCMJ; 10 U.S.C. §836(a).



*States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944); *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), *cert. den.* 342 U.S. 920; *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946).[56]

In this case, we have seen that the documents sought were more than mere "arguably relevant" or possibly exculpatory *Brady* material; rather, they were *central* to the entire case. Therefore, *a fortiori*, full disclosure was required.

The Air Force asserted a "privilege" to refuse or limit access by the accused and his counsel because of the classified nature of the evidence and because disclosure purportedly would be detrimental to the national interest. Although there is a limited "national security" privilege in civil actions, *Reynolds v. United States*, 345 U.S. 1, it has not been extended to criminal prosecutions because of the fundamental unfairness that would impose on criminal defendants.

> ". . . [S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *Reynolds v. United States, supra*, 345 U.S. at 12.

[56]The proper standard for disclosure under *Brady, supra*, has been stated as whether the evidence "would be helpful to the defendant." *Levin v. Clark*, 408 F.2d 1209 (D.C. Cir. 1967), reiterating the principles of *Levin v. Katzenbach*, 368 F.2d 287 (D.C. Cir. 1966). See, also, *Ashley v. Texas*, 319 F.2d 80 (5th Cir. 1963), *cert. den.* 375 U.S. 931; *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964); *United States ex rel. Butler v. Maroney*, 319 F.2d 622, 627 (3d Cir. 1963).

In *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944), the court reversed convictions because the government had not disclosed "confidential" departmental documents which the defendants had asserted to be relevant to their defense. Chief Judge Learned Hand stated:

> "While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and lay bare their subject matter. The Government may choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them." 142 F.2d 506.

See also, *United States v. Beekman, supra.*

In *United States v. Coplon, supra*, Chief Judge Hand applied the *Andolschek* doctrine to information which the government claimed to be privileged national security material. The *Coplon* court reversed a conviction for conspiracy to deliver defense information to a citizen of a foreign nation on the grounds that the failure of the prosecution to disclose wiretapping evidence claimed to constitute "state secrets" was a *per se* violation of the rights of the defendant. The court cited the *Andolschek* opinion and noted once again that the government had a choice in the matter: "[T]he prosecution must decide whether the public prejudice



of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defense." *Id.* at 538.[57]

The government itself has acknowledged on various occasions that it has a duty to make full disclosure to the defense, even when such disclosure may involve "state secrets." The government's brief in this Court in the cases of *Ivanov v. United States* and *Butenko v. United States*, Nos. 11 and 1972, October Term 1968,[58] recognized the "hard choice" between possibly "jeopardizing internal security or risking foreign embarrassment, on the one hand," and not prosecuting the accused, on the other (Govt. Brief at 9). In deciding these cases, and rejecting another claim for governmental privilege regarding certain illegal wiretap reports, the Court carefully noted the government's position:

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[57]See also *Alderman v. United States*, 394 U.S. 165; *United States v. Grayson*, 166 F.2d 863 (2d Cir. 1948); *United States v. Beekman, supra; United States v. Burr*, 25 Fed. Cas. 187 (C.C.Va. 1807) (Marshall, C.J.); *Cf., Jencks v. United States*, 353 U.S. 657, 672; *Roviaro v. United States, supra*. In *United States v. Schneiderman*, 106 F.Supp. 731, 736-737 (C.D.Calif. 1952), the court held that the defense was entitled to any document that was arguably "competent, relevant and material to any degree not clearly de minimis," even if its release would affect national security. Indeed, the *Schneiderman* court found that the documents in question were of doubtful value to the defense but held that all such doubts were to be resolved in favor of the defense. See also *United States v. Coplon, supra*, 185 F.2d at 638: "in truth it is highly unlikely that Coplon suffered the slightest handicap by the judge's refusal." In the instant case, however, the documents sought are central to the case, and unlimited access to them is fundamental to an effective defense.

[58]Decided together with *Alderman v. United States, supra.*

"The Government concedes that it must disclose to petitioners any surveillance records which are relevant to the decision of this ultimate issue. And it recognizes that this disclosure must be made *even though attended by potential danger to the reputation or safety of third parties or to the national security*–unless the United States would perfer dismissal of the case to disclosure of information. . ." *Alderman v. United States, supra*, 394 U.S. at 181 (emphasis added).

In sum, the cases as well as fairness and due process require full disclosure by the government of all material relating to the criminal charges it has initiated. Indeed, the cases and authorities cited above make clear that the right of a criminal defendant to disclosure is absolute and unquestioned.

### C. The Rule Requiring Access To Relevant Evidence Applies To Courts-Martial.

The government's argument on the access issue reduces to the flat assertion that the constitutional right to disclosure of and access to relevant evidence does not apply to military trials, or at least to *this* military trial. This view turns on the discredited notion that servicemen are not entitled to the protections of the Bill of Rights.

"It is true that some early cases can be cited for the proposition that military personnel have no constitutional rights whatsoever. Whatever validity this view may have had in the past, it has been true for at least two decades that military personnel are entitled to some form of due process." *Betonie v. Sizemore*, 496 F.2d 1001, 1006 (5th Cir. 1974).



See, Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L Rev. 181 (1962); Sherman, *The Civilianization of Military Law*, 22 Me.L.Rev. 3 (1970); Note, *Servicemen in Civilian Courts*, 76 Yale L.J. 380, 391-392 (1966).

The seminal case was *Burns v. Wilson*, 346 U.S. 137, where the Court held that:

"[T]he constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers - as well as civilians - from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts." 346 U.S. at 142-143.

In response, the lower federal courts and the Court of Military Appeals have integrated the United States Constitution into military justice; one by one, most of the specific guarantees of the various constitutional amendments have been held applicable to the military.[59] The standard applied has been set forth

[59]See, *e.g.*, *Hagopian v. Knowlton*, 470 F.2d 20 (2d Cir. 1972) (right to due process hearing in disciplinary and discharge proceedings); *Shaw v. United States*, 357 F.2d 949 (Ct. Cl. 1966) (right to presumption of innocence); *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965) (right to effective assistance of counsel); *Powers v. Hunter*, 178 F.2d 141 (10th Cir. 1949) (right to be protected against cruel and unusual punishment); *Carlson v. Schlesinger*, 364 F.Supp. 626 (D.D.C. 1973) (First Amendment-

similarly by the federal courts and by the Court of Military Appeals as requiring the application of constitutional provisions except where they are "expressly or by *necessary* implication inapplicable." *United States v. Jacoby*, 21 U.S.C.M.A. 428, 29 CMR 244 at 246-247 (1960) (emphasis added).[60] The dramatic change from the traditional view was highlighted by the Court of Military Appeals in its decision in *United States v. Tempia, supra*:

> "The time is long since past . . . when this court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights." 37 C.M.R. at 253.

Whatever test is used, once it is conceded, as it must be, that an accused serviceman facing court-martial is entitled to due process and a fair trial, the rule

speech); *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (First Amendment–religion); *United States v. Tempia*, 16 USCMA 625, 37 CMR 249 (1967) (right to Miranda-type warnings); *United States v. Hartsook*, 15 USCMA 291, 35 CMR 263 (1965) (right to protection against unreasonable searches and seizures); *United States v. Sweeney*, 14 USCMA 599, 34 CMR 379 (1964) (right to compulsory process); *United States v. Schlack*, 14 USCMA 371, 34 CMR 151 (1964) (right to speedy trial); *United States v. Culp*, 14 USCMA 199, 33 CMR 411 (1963) (right to counsel); *United States v. Kemp*, 13 USCMA 89, 32 CMR 89 (1962) (right against self-incrimination); *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960) (right to confront witnesses).

[60]See *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969), *cert. den.* 396 U.S. 1013; *Yahr v. Resor*, 431 F.2d 690 (4th Cir. 1970), *cert. den.* 401 U.S. 982; *Betonie v. Sizemore, supra; Schita v. King*, 133 F.2d 283 (8th Cir. 1943); *Melvin v. Laird*, 365 F.Supp. 511 (E.D.N.Y. 1973).



requiring disclosure of and access to the very evidence upon which the charges are based must be applied to court-martial proceedings. For if those guarantees are to be at all meaningful, then they must ensure that a defendant be permitted to present an effective defense with the effective assistance of counsel.[61] See *Whelchel v. McDonald, supra*. As the Court noted in *Powell v Alabama*, 287 U.S. 45, 59:

> "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case."

Nor can there by any "military necessity" in imposing the access restrictions at issue here. For while DeChamplain is charged with espionage, he is charged under the civilian espionage statute as assimilated into military law under the third clause of Article 134.[62]

[61]The right of a serviceman to the effective assistance of civilian counsel of his choice is preserved by statute, Article 38, U.C.M.J., 10 U.S.C. §838, and by the Constitution. *Betonie v. Sizemore, supra; Ashe v. McNamara, supra; Smith v. McNamara*, 395 F.2d 896 (10th Cir. 1968), *cert. den.* 394 U.S. 934; *Henry v. Warner*, 357 F.Supp. 495 (C.D. Cal. 1973); *Application of Stapley*, 246 F.Supp. 316 (D. Utah 1965); *Denton v. United States*, 144 Ct. Cl. 840, 863 (1959), *cert. den.* 361 U.S. 821; *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F.Supp. 295 (1947); *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); *United States v. Alderman*, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973); *contra, Daigle v. Warner*, 490 F.2d 358 (9th Cir. 1974).

[62] The government now concedes that DeChamplain is charged only under the third clause of Article 134, and not under the first two clauses (Brief in Opposition to Motion to Dismiss at 2).

Indeed, there is no separate military espionage statute. The government has no greater interest in protecting "state secrets" in an espionage prosecution brought within the military than it does in an espionage case brought under the identical statute in civilian court. While that interest may be substantial, it does not permit the government to invoke the jurisdiction of a court and then to deprive the defendant of an opportunity to defend himself effectively. The government must either disclose the evidence for use in the defense of the charges, or forego prosecution.

## CONCLUSION

The appeal should be dismissed. Alternatively the decision of the district court should be affirmed with respect to the "access to documents" cause of action.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

**No. 73-1346**

JOHN L. McLUCAS, Secretary of the Air Force, *et al.*,

*Appellants,*

—v.—

RAYMOND G. DECHAMPLAIN,

*Appellee.*

## BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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RAYMOND G. DECHAMPLAIN,

Appellee.

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BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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## Interest of Amicus[1/]

The American Civil Liberties Union is a nationwide, non-partisan organization of more

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1/ Letters from the parties, consenting to the filing of this brief, have been lodged with the Clerk of the Court.

than 250,000 members devoted solely to protection of the Bill of Rights. Since the earliest days of its existence, more than half a century ago, the ACLU has provided support and representation to criminal defendants asserting their Fifth and Sixth Amendment rights to due process of law and effective assistance of counsel. In recent years the ACLU has also participated in litigation challenging misuse of the classification system to invade constitutional rights. One of the issues in this case--and the only one we address in this brief--involves a serious and far-reaching restriction on the right of a citizen to prepare a defense against criminal charges based on classified evidence.

## Question Presented

In a criminal prosecution brought pursuant to 18 U.S.C. § 793, must the government provide the defendant and his chief defense counsel with unlimited access to and use of relevant evidence, subject to a protective order against disclosure to those not involved in the defense of the case?

## Statement of the Case

DeChamplain is a master sergeant in the United States Air Force. He was arrested on July 2, 1971 on three charges, including copying and attempting to deliver classified documents affecting the national defense to unauthorized persons, in violation of 18



U.S.C. § 793.2/ He has been held in confinement continuously since the date of his arrest.

In November 1971 DeChamplain was tried and convicted as charged by a general court-martial. His conviction was reversed on October 5, 1972 by the Air Force Court of Military Review, on the ground that it was based on a coerced and unlawful confession. United States v. DeChamplain, ACM 21034, 46 C.M.R. 784. The Court of Military Appeals affirmed the reversal on February 22, 1973. 22 U.S.C. M.A. 150, 46 C.M.R. 150.

On May 30, 1973 the Air Force brought the same charges against DeChamplain, modified to reflect the reversal of his earlier conviction. Thereafter, DeChamplain retained civilian counsel to represent him at his second court martial. Counsel requested unrestricted access to the record of the prior proceedings and to the documents upon which both the earlier and the subsequent charges were based. The Air Force refused to grant De Champlain's counsel access to the "classified" portions of the prior proceedings or to the documents in question, and insisted that counsel would have to obtain a security clearance. The Court of Military Appeals declined to review this determination. DeCham-

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2/ He was also charged with violations of Article 134, U.C.M.J., 10 U.S.C. § 934, and 50 U.S.C. App. § 783(b); and Article 92, U.C.M.J., 10 U.S.C. § 892.

plain v. McLucas, 22 U.S.C.M.A. 462, 47 C.M.R. 552.

On September 20, 1973 the government announced a final decision on access. Counsel would be absolutely barred from access to fifteen documents which had been introduced at DeChamplain's first court-martial, as well as all references to those documents in the record of that trial. The government sought to avoid the defense's objections by unilaterally dropping the specifications relating to the fifteen documents.

Counsel also was not to be permitted to receive copies of the nine documents (or the references to them in the prior record of trial) upon which the remaining outstanding charges were based. He was to be allowed, however, to look at the documents under severe restrictions. He could examine the documents and discuss their contents only in the presence of officials holding appropriate security clearances, and only at a time and place chosen by the government. He would not be entitled to retain notes with respect to classified matters from such documents for use in his office in preparation for trial, but would have to surrender such notes to be "secured" by the government. Moreover, he would have to submit all his notes to government personnel for decision as to whether or not they relate to classified material and must be "secured".

No other members of the civilian defense team, including associate attorneys, expert



consultants, and potential expert witnesses could observe the documents or even receive second-hand information about their contents, with the exception of one associate attorney and one legal secretary. Finally, counsel could not discuss any aspects of the documents with his associate or with military counsel in his office or home; he could only discuss such information in a designated government office and then only with individuals with the proper security clearances. Nor could DeChamplain retain his classified notes for delivery to his civilian counsel or otherwise make written reference to the classified exhibits or to other relevant sections of the record.

The military judge approved the terms of the government's restrictions upon access without modification by order dated October 13, 1973.

Prior to the scheduled commencement of his court martial on November 15, 1973, DeChamplain obtained an injunction from the United States District Court for the District of Columbia requiring the Air Force, inter alia, to grant his attorney unlimited access to the documents and the record of the prior trial, subject to a judicial protective order against disclosure to third parties. The Court held that the access limitations would "effectively handcuff... retained civilian counsel" and thereby deprived DeChamplain of his Fifth and Sixth Amendment rights. The government has ap-

pealed to this Court.3/

## Introduction

In its opinion, the District Court observed that:

> The government must be put to the choice. It may not bring serious charges against an individual and at the same time withhold crucial evidence from the accused [367 F. Supp. at 1295].

Without directly disputing the validity of that statement, the government contends that its attempted restrictions on defense counsel's access to the nine documents upon which the current charges against DeChamplain are based do not amount to "withholding of evidence". The government further asserts that the remaining fifteen classified documents, purportedly found on DeChamplain's person at the time of his arrest may now be completely suppressed, notwithstanding their introduction as prosecution exhibits at DeChamplain's first trial.

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3/ The issues on appeal other than access are not addressed in this amicus brief.



## Argument

### I.

### THE DRASTIC RESTRICTION ON DEFENSE COUNSEL'S ACCESS TO THE VERY EVIDENCE ON WHICH THE PROSECUTION IS BASED CONSTITUTES A DENIAL OF DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL.

The Air Force has failed to "come forward with any convincing justification, military or otherwise" [367 F. Supp. at 1295], for the drastic restrictions on defense counsel's access to and use of the nine documents underlying the charges against DeChamplain. Indeed, the sole paragraph in the government's brief referring to those restrictions boldly asserts that the Air Force seeks "a reasonable accommodation of the accused's interests and the military's legitimate interests in preventing widespread dissemination of such sensitive materials" [Gov't br., at 35]. However, the rights of a person accused of a crime to effective assistance of counsel and due process of law are not subject to any "accommodation" on terms dictated by the prosecution.

It is well established that in a criminal prosecution the government must either make all potentially exculpatory material in its possession available to the defense, or abandon the prosecution. See, e.g., Dennis v. United States, 384 U.S. 855 (1966); Brady v. Maryland, 373 U.S. 83 (1963); Rovario v. United States, 353 U.S. 53 (1957); Ashley v.

Texas, 319 F.2d 80, 85 (5th Cir. 1963), cert. denied 375 U.S. 931 (1963); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964); United States ex rel. Butler v. Maroney, 319 F.2d 622, 627 (3rd Cir. 1963). A fortiori, the government may not supress documents in a criminal prosecution "founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate." United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944).

By definition, cases of espionage fall within this category, for the corpus delecti of the offense is information, usually in documentary form, the possession and/or transmission of which may become punishable only upon a finding beyond a reasonable doubt that it falls within a multifaceted and rigorously circumscribed set of criteria. 18 U.S.C. § 793. See Gorin v. United States, 312 U.S. 19 (1940); Boeckenhaupt v. United States, 392 F.2d 24 (4th Cir. 1968), cert. denied, 393 U.S. 896 (1968); United States v. Drummond, 354 F.2d 132, 152 (2d Cir. 1965); United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952), cert. denied, 344 U.S. 838 (1952); United States v. Heine, 151 F.2d 813 (2d Cir. 1945). See generally, Edgar and Schmidt, The Espionage Statutes and Publication of National Defense Information, 73 COL. L. REV. 929 (1973). 4/ The prepara-

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4/ See discussion of the elements of the crime of espionage in Appellee's brief, at



tion of an effective defense to a charge of espionage, therefore, can only proceed on the basis of a thorough and rigorous analysis of the contents, line by line and word by word, of the materials at issue.

However, defendant's right to effective representation by counsel who has had adequate opportunity to prepare his case does not rest solely on the specific requirements of the espionage law, but is in itself an independent and indispensable ingredient of due process for all criminal trials. Since Powell v. Alabama, 287 U.S. 45, 57, 71 (1932), it has been clear that due process is violated when counsel is forced to proceed "under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case," a vital ingredient of which is "thoroughgoing investigation and preparation." Since Powell the federal courts have frequently reversed convictions where counsel's pretrial investigation of the facts has been inadequate, either as a result of his own dereliction, e.g., Jones v. Cunningham, 313 F.2d 347, 353 (4th Cir. 1963); Kott v. Green, 303 F. Supp. 821, 823 (N.D. Ohio 1968), or by virtue of external circumstances, e.g., Powell v. Alabama, supra; United States ex. rel. Sanders v. Ohio, 322 F. Supp. 28, 31 (S.D. Ohio 1971).

It should come as no surprise, therefore, that efforts by the prosecution or those allied with it to hinder or obstruct the preparation of the defense have met with

little favor. Such hindrance or obstruction has been found to exist even when defense counsel is barred by the government from obtaining material in the possession of third parties.

In Powell v. United States, 156 F. Supp. 526 (N.D. Cal. 1957), for example, defendants were charged with circulating and disseminating false information intended to cause insubordination and disloyalty among United States troops. The allegedly false statements concerned the purpose and effect of certain U.S. military operations during the Korean War. As in the case of an espionage prosecution, both the nature of the information involved and the degree and nature of scienter with which the acts charged may have been performed were vital elements of a potential defense. Powell's defense counsel, therefore, sought to investigate these elements of the case and applied to the State Department for visas to travel to North Korea and mainland China, where he desired to interview witnesses and collect relevant documents. The State Department refused to validate the defense attorney's passport, in adherence to current policy. The Powell court found the situation clear:

> So the United States has its choice. It can choose to adhere to its policy of non-issuance of such passports. Or it can decide that it is more important to prosecute this criminal case. If the former be its choice, it will mean a discontinuance of the present prosecution [156 F. Supp. at 530].



See also Coppolino v. Helpern, 266 F. Supp. 930 (S.D.N.Y. 1967), in which the Court enjoined a prosecution expert in a pending state murder trial from preventing a subordinate from discussing certain pathological findings and reports with defense counsel, who had sought to interview him in preparing the defense.

The government in this case concedes, as it must, that generally it may not withhold evidence or obstruct defense preparations, but it nevertheless contends that it has been necessary to do so here. The government's restricted access "rules" would compel defendant and his counsel to select one (and only one) associate lawyer, foreign policy expert, classification expert, and secretary, all of whom may read and discuss the documents only in the presence of appropriately cleared Air Force (i.e. prosecution) personnel, who shall also review any written work product and keep possession of whatever bears on the classified material. Finally, the trial and presumably all such "access" shall take place in Missouri.

As observed by the District Court, the restrictions sought to be placed here on counsel's access to and use of the corpus delicti of this case are tantamount to a "handcuffing" of the defense [367 F. Supp. at 1295]. These restrictions are completely at odds with due process and the right to effective assistance of counsel. Either the restrictions must be dropped or the prosecution abandoned.

## II.

## THE PROSECUTION'S WITHHOLDING OF OTHER POTENTIALLY EXCULPATORY DOCUMENTS FROM DEFENSE COUNSEL ALSO DEPRIVES DECHAMPLAIN OF DUE PROCESS AND ABRIDGES HIS RIGHT TO COUNSEL.

In addition to imposing crippling restrictions on defense counsel's access to the nine documents which constitute the corpus delicti of the offenses charged, the government flatly refuses to allow DeChamplain's defense counsel any access whatever to fifteen other classified documents found in defendant's possession at the time of his arrest. The government seeks also to suppress any references to such documents or their contents which appear in the record of DeChamplain's first trial, at which all were introduced as evidence by the prosecution, claiming that the prosecution has absolved itself of any obligation to disclose these documents by withdrawing the charges concerning three of them and promising that none "will ... be introduced as evidence" at the second trial [Gov't br., at 36]. However, by abandoning its own reliance on the fifteen documents, the government has done nothing to alter the potentially exculpatory status of these materials, to which the defendant must have full access in order to prepare his defense.

The basic principle governing this aspect of the case was declared by this Court in Brady v. Maryland, 373 U.S. 83, 87 (1963):

> We hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.



It is in the determination of what is "favorable to an accused" [373 U.S. at 87] that the adversary role of defense counsel is indispensable. Counsel's familiarity with the facts of the case and his loyality to and identification with his client provide the best assurance that no potentially fruitful line of defense will be left unexplored. For this reason, counsel's judgment as to the relevance of pertinent information to his case is to be preferred, even to that of the trial judge.

In Dennis v. United States, 384 U.S. 855 (1966), for example, the Court unanimously ordered that certain grand jury minutes containing prior testimony of key government witnesses be turned over to the defense for impeachment or any other purpose to which the defense might put them. In so doing the Court explicitly rejected an in camera screening of the minutes by the trial judge and stressed the role of defense counsel in deciding whether and how they might be used:

> [It is not] realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate pur-

> poses, however conscientiously made, would exhaust the possibilities. In our adversary system, .... [t]he determination of what may be useful for the defense can properly and effectively be made only by an advocate [384 U.S. at 875] [emphasis added].

See also Alderman v. United States, 394 U.S. 165, 184 (1969).

If it is "unrealistic" to allow a judge to determine the utility to the defense of relevant material, it would seem hardly less fanciful to permit the prosecution to do so, as the government proposes here. Nor can it seriously be contended that by merely excluding the material from the charges and its own case in chief the government can magically render the very items in possession of which defendant was arrested so tangential to his defense that his own attorney may be foreclosed from even seeing them. 5/

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5/ In view of the restrictions placed on discussions of this material between and among civilian and military defense counsel, possible expert witnesses and the accused, the government's position that the accused's and his military counsel's memory of his first trial are tantamount to disclosure to civilian counsel [Gov't br., at 36] is absurd. These restrictions are specifically designed to prevent civilian counsel from



In Rovario v. United States, 353 U.S. 53, 64 (1957), the Court found particular unfairness in the prosecution's refusal to disclose to the defense the prior testimony of a confidential informant, who was:

> the only person, other than petitioner himself, who could controvert, amplify, or explain [the government's key witnesses'] report of [an incriminating] conversation.

Is it possible even for a moment to claim that fifteen out of twenty-four contraband items found on the defendant at the time of his arrest are not material which "could controvert, amplify, or explain" the nine other items upon which the formal charges against him are purportedly based?

"Where there is room for substantial doubt, the prosecution is not to decide for the Court what is admissible or for the defense what is useful." Griffin v. United States, 183 F.2d 990, 993 (D.C. Cir. 1950).

Under the facts of the instant case there can be no doubt, much less a substantial doubt, of the critical bearing on the defense of all of the documents found in DeChamplain's poss-

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5/ cont. acquiring any knowledge of the contents of the documents and are entirely effective in doing so.

ession at the time of his arrest, no matter how many or how few of them the government may choose to introduce. In such circumstances the prosecution's obligation to disclose is manifest. As Chief Judge Hand succinctly put it in United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950), "we can see no significant distinction between introducing evidence against an accused which he is not allowed to see, and denying him the right to put in evidence on his own behalf."

In Coplon Judge Hand required defense access to records which he conceded bore only the most tenuous relationship to the trial record before him. That case also arose out of charges of conspiracy to violate the espionage laws. During the trial the government disclosed that it had conducted illegal wiretaps of defendant and others. While the prosecution made no attempt to introduce the fruits of the taps as evidence, it was obliged to demonstrate to the court that no "leads" from such taps led to evidence actually used at trial. The government turned over numerous documents and recordings to the defense for its use in developing suppress motions, but as to several documents it asserted a "state secrets" privilege and submitted them to the court for an in camera, ex parte determination as to whether they had "led" to any evidence introduced. The Second Circuit ruled unanimously that it was error not to have allowed the defense access to the wiretap records. The Court pointed out that:



> Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers [is] galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism [185 F.2d at 638].

In the instant case, DeChamplain has more than a "flimsy grievance" when his attorney is forced to defend his client's freedom in total ignorance of most of the material in DeChamplain's possession when he was arrested. Without access to this material, due process and the right to counsel are a sham.

## Conclusion

For the foregoing reasons, as well as the reasons fully set forth in appellee's brief, the appeal should be dismissed, or, alternatively the decision of the District Court with respect to the "access of documents" issue should be affirmed.

Respectfully submitted,

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